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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

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*Commissioner Quello designated as Chairman effective February 5, 1993.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments to Parts 0, 1, 21, and 74
of the Commission's Rules

ORDER

Adopted: February 22, 1993; Released: March 22, 1993

By the Commission:

1. The Commission is transferring the processing of certain Mass Media and Common Carrier applications from its Washington, D.C. offices to the offices of the Private Radio Bureau in Gettysburg, Pennsylvania. By this order, we revise various portions of the Commission's Rules to reflect that transfer. The revisions are attached as Appendix A to this order.

2. Because each of these rule changes relates to agency organization, procedure, or practice, the notice and comment and effective date provisions of the Administrative Procedure Act are inapplicable. *See* 5 U.S.C. §553(b)(A), 553(d).

3. Accordingly, IT IS ORDERED THAT, Parts 0, 1, 21, and 74 of the Commission's Rules ARE AMENDED as set forth in the appendix, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 0 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 0 continues to read as follows:

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.453 is amended to read as follows:

§ 0.453 Public Reference Rooms

The Commission maintains the following public reference rooms at its offices in Washington, D.C. and Gettysburg, Pennsylvania: With the exception of the Private Radio Bureau Reference Room, which is located in Gettysburg, Pennsylvania, all reference rooms are located in Washington, D.C.:

* * * * *

(d) The Mass Media Bureau, Auxiliary Services Reference Room. The following documents, files and records are available for inspection at this location.

(1) International Broadcast applications and related files.

(2) FM Translator applications and related files.

(3) FM Booster station applications and related files.

(e) The Mass Media Bureau, Enforcement Division, Reference Room.

* * * * *

(g) The Common Carrier Bureau, Domestic Facilities Reference Room. The following documents, files, and records are available for inspection at this location.

(1) Multi-Point Distribution Service application files and related materials.

* * * * *

(l) The Private Radio Bureau Reference Room (Gettysburg, Pennsylvania). All authorizations in the Private Radio services and files relating thereto, which includes Land Mobile, Microwave, Aviation Ground, and Marine Coast applications. This reference room also contains station files containing applications and related materials for Remote Pickup, Aural STL/ICR, TV Auxiliary, and Low Power Auxiliary Stations in the Mass Media services. This reference room also contains station files containing applications and related materials for the Point-to-Point Microwave (including the Local Television Transmission Service) and Digital Electronic Message (DEMS) services in the Common Carrier services. Cards summarizing the historical record of applications and dispositions of the Broadcast Auxiliary service through May 1982 are available for inspection as well.

Part 1 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.1104 is amended to read as follows:

§ 1.1104 Schedule of charges for mass media services.

* * * * *

5. Auxiliary Services (includes Remote Pickup stations, TV Auxiliary Broadcast stations, Aural Broadcast stations, Aural Broadcast STL and Intercity Relay stations, and Low Power Auxiliary):

a. Major Action (per application)	Federal Communications Commission, Mass Media Services, P.O. Box 358700, Pittsburgh, PA 15251-5700.

b. License Renewal (per application)	Federal Communications Commission, Mass Media Services, P.O. Box 358700, Pittsburgh, PA 15251-5700.
c. Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent) (per application).	Federal Communications Commission, Mass Media Services, P.O. Box 358700, Pittsburgh, PA 15251-5700.

* * * * *

3. Section 1.1105 is amended to read as follows:

§ 1.1105 Schedule of charges for common carrier services.

* * * * *

6. Point-to-Point Microwave and Local Television Radio Service:

a. Conditional License (per station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
b. Major Modification of Conditional License or License Authorization (per station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
c. Certificate of Completion of Construction (per station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
d. Renewal (per licensed station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
e. Assignment or Transfer (i) First Station on Application	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680
(ii) Each Additional Application	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680
f. Extension of Construction Authorization (per station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680
g. Special Temporary Authority or Request for Waiver of Prior Construction Authorization (per request)	Federal Communications Commission Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680

* * * * *

8. Digital Electronic Message Service

a. Conditional License (per nodal station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
b. Major Modification of Conditional License or License Authorization (per nodal station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
c. Certificate of Completion of Construction (per nodal station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
d. Renewal (per licensed nodal station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680.
e. Assignment or Transfer (i) First Station on Application)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680
(ii) Each Additional Station	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680
f. Extension of Construction Authorization (per station)	Federal Communications Commission, Common Carrier Domestic Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680
g. Special Temporary Authority or Request for Waiver	Federal Communications Commission Common Carrier Domestic

of Prior Construction Authorization (per request)	Radio, P.O. Box 358680, Pittsburgh, PA 15251-5680

* * * * *

Part 21 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 21 continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

2. Section 21.6 is amended to read as follows:

§ 21.6 Filing of applications, fees, and numbers of copies.

* * * * *

(b) Applications requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with § 0.401(b) of the rules. Applications not requiring fees shall be submitted to: Federal Communications Commission, Washington, DC 20554, except that applications in the Digital Electronic Message Service (DEMS) and the Point-to-Point Microwave Service not requiring fees shall be submitted to: Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, PA 17325.

(c) All correspondence or amendments concerning a submitted application shall clearly identify the radio service, the name of the applicant, station location, and the Commission file number (if known) or station call sign of the application involved. All correspondence or amendments concerning a submitted application may be sent directly to the Common Carrier Bureau, with the exception of correspondence or amendments in the DEMS and Point-to-Point Microwave services. In the case of the DEMS and Point-to-Point Microwave services, correspondence or amendments not requiring payment of a fee shall be submitted to: Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, PA 17325.

3. Section 21.13(b) is amended to read as follows:

(b) * * * Provided, that applications in the Digital Electronic Message Service (DEMS) and the Point-to-Point Microwave Service shall not cross-reference previously filed material.

4. Section 21.303 is amended to read as follows:

§ 21.303 Discontinuance, reduction or impairment of service.

(a) If the public communication service provided by a station in the Domestic Public Radio Services is involuntarily discontinued, reduced or impaired for a period exceeding 48 hours, the station licensee shall promptly give notification thereof in writing to the Commission at Washington, D.C. 20554. Provided, that in the case of the Point-to-Point Microwave Service, the Local Television Transmission Service, and the Digital Electronic Microwave Service, such notification shall be sent to the Commission at Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325. In every such case, the licensee shall furnish full particulars as to the reasons for such discontinuance, reduction or impairment of service, including a statement as to when normal service is expected to be resumed. When normal service is resumed, prompt notification thereof shall be given in writing to the Commission at Washington, D.C. 20554 or to the Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325, as appropriate.

(b) No station licensee subject to Title II of the Communications Act of 1934, as amended, shall voluntarily discontinue, reduce or impair public communication service to a community or part of a community without obtaining prior authorization from the Commission pursuant to the procedures set forth in Part 63 of this chapter or complying with the requirements set forth at § 21.910. In the event that permanent discontinuance of service is authorized by the Commission, the station licensee shall promptly send the station license to the Commission at Washington, D.C. 20554. Provided, that in the case of the Point-to-Point Microwave Service, the Local Television Transmission Service, and the Digital Electronic Microwave Service, the station license shall be sent to Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation. Provided further, that Multipoint Distribution Service station licenses need not be surrendered for cancellation if the discontinuance is a result of a change of status by a Multipoint Distribution Service licensee from common carrier to non-common carrier pursuant to § 21.910.

(c) Any station licensee, not subject to Title II of the Communications Act of 1934, as amended, who voluntarily discontinues, reduces or impairs public communication service to a community or a part of a community shall give written notification to the Commission within 7 days thereof. In the event of permanent discontinuance of service, the station licensee shall promptly send the station license to the Commission at Washington, D.C. 20554. Provided, that in the case of the Point-to-Point Microwave Service, the Local Television Transmission Service, and the Digital Electronic Microwave Service, the station license shall be sent to Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation. Provided further, that Multipoint Distribution Service station licenses need not be surrendered for cancellation if the discontinuance is a result of a change of status by a Multipoint Distribution Service licensee from common carrier to non-common carrier pursuant to § 21.910.

* * * * *

(d) * * *

(1) Submit for cancellation the station license (or licenses) to the Commission at Washington, D.C. 20554. Provided, that in the case of the Point-to-Point Microwave Service, the Local Television Transmission Service, and the Digital Electronic Microwave Service, the station license(s) shall be sent to Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation.

Part 74 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 74 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. Section 74.432 is amended to read as follows:

§ 74.432 Licensing requirements and procedures.

* * * * *

(k) In the case of permanent discontinuance of operation of a station or system licensed under this subpart, the licensee shall forward the station or system license to the FCC at Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation. For purposes of this section, a station which is not operated for a period of one year is considered to have been permanently discontinued.

* * * * *

3. Section 74.433 is amended to read as follows:

§ 74.433 Temporary authorizations.

* * * * *

(c) An informal request for special temporary authority requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, P.O. Box 358700, Pittsburgh, PA 15251-5700. An informal request for special temporary authority not requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325. All requests must include full particulars including: licensee's name, call letters of associated broadcast station or stations, name and address of individual designated to receive return authorization, call letters of remote pickup station, if assigned, type and manufacturer of equipment, power output, emission, frequency or frequencies proposed to be used, commencement and termination date, location of operation and purpose for which request is made including any particular justification.

* * * * *

4. Section 74.452 is amended to read as follows:

§ 74.452 Equipment changes.

* * * * *

(c) The FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 shall be promptly notified of any equipment changes made pursuant to paragraph (b) of this section.

* * * * *

5. Section 74.532 is amended to read as follows:

§ 74.532 Licensing requirements.

* * * * *

(f) In case of permanent discontinuance of operation of a station licensed under this subpart, the licensee shall forward the station license to the Federal Communications Commission, Broadcast Auxiliary Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation.

* * * * *

6. Section 74.537 is amended to read as follows:

§ 74.537 Temporary authorizations.

* * * * *

(c) An informal request for special temporary authority requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, P.O. Box 358700, Pittsburgh, PA 15251-5700. An informal request for special temporary authority not requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325. All requests must include full particulars including: licensee's name, call letters of the associated broadcast station(s), name and address of individual designated to receive the return authorization, call letters of the aural broadcast STL or intercity relay station, if assigned, type and manufacturer of equipment, power output, emission, frequency or frequencies proposed for use, commencement and termination date and location of the proposed operation, and purpose for which request is made including any particular justification.

* * * * *

7. Section 74.551 is amended to read as follows:

§ 74.551 Equipment changes.

* * * * *

(b) Other equipment changes not specifically referred to in this section may be made at the discretion of the licensee, provided that the FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 is promptly notified in writing upon the completion of such changes, and that the changes are described in the notification.

* * * * *

8. Section 74.632 is amended to read as follows:

§ 74.632 Licensing requirements.

* * * * *

(g) In case of permanent discontinuance of operation of a station licensed under this subpart, the licensee shall forward the station license to the Federal Communications Commission, Broadcast Radio Auxiliary Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325.

* * * * *

9. Section 74.633 is amended to read as follows:

§ 74.633 Temporary Authorizations.

* * * * *

(b) A request for special temporary authority for the operation of a television broadcast auxiliary station may be made by informal application. An informal application for special temporary authority requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, P.O. Box 358700, Pittsburgh, PA 15251-5700. An informal application for special temporary authority not requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325. Such applications shall be filed with the Commission at least 10 days prior to the date of the proposed operation: * * *

* * * * *

10. Section 74.651 is amended to read as follows:

§ 74.651 Equipment changes.

(b) Other equipment changes not specifically referred to in paragraph (a) of this section may be made at the discretion of the licensee provided that the Federal Communications Commission, Broadcast Auxiliary Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 is promptly notified in writing upon the completion of such changes, and that the changes are described in the notification.

* * * * *

11. Section 74.832 is amended to read as follows:

§ 74.832 Licensing requirements and procedures.

* * * * *

(i) In case of permanent discontinuance of operation of a station licensed under this subpart, the licensee shall forward the station license to the Federal Communications Commission, Broadcast Auxiliary Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation.

* * * * *

12. Section 74.833 is amended to read as follows:

§ 74.833 Temporary authorizations.

* * * * *

(c) An informal request for special temporary authority requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, Broadcast Auxiliary Radio Services, P.O. Box 358700, Pittsburgh, PA 15251-5700. An informal request for special temporary authority not requiring payment of a fee shall be addressed to the FCC at Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325. All requests must include full particulars including: applicant's name, statement of eligibility, call letters of associated broadcast station or stations, if any, name and address of individual designated to receive the return telegram, type and manufacturer of equipment, power output, emission, frequency or frequencies proposed to be used, commencement and termination date, location of proposed operation, and purpose for which request is made including any particular justification.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 12, 1993

COMMENTS INVITED ON SOUTH DAKOTA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for South Dakota (Region 38).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 38 consists of the state of South Dakota. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 21, 1993** and reply comments on or before **May 6, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-57 South Dakota-Public Safety Region 38.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies
Tariff F.C.C. No. 1
NYNEX Enterprise Service

Transmittal Nos. 159 and 170

ORDER

Adopted: March 12, 1993; Released: March 15, 1993

By the Deputy Chief, Common Carrier Bureau (Policy):

1. On February 5, 1993, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 159 to revise its offering of Enterprise Service. Enterprise Service is an end-to-end DS0 service provided over fiber optic transport facilities and entails placement of multiplexing equipment on the customer's premises. Enterprise Service, introduced by Transmittal No. 127, became effective subject to specific restrictions imposed on the service pursuant to the Bureau's waiver of Section 64.702(e) of the Commission's Rules.[1] NYNEX intends that the revisions to Enterprise Service made by Transmittal 159 conform the offering to the *Waiver Order*.

2. On February 12, 1993, the Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed a petition to suspend and investigate Transmittal 159. NYNEX filed its reply on February 22, 1993.

3. IDCMA argues that NYNEX has misinterpreted the 22 channel restriction of the *Waiver Order*, rendering the 22 channel restriction inconsequential. IDCMA Petition at 2. IDCMA contends that NYNEX will be able to deploy additional channels and additional multiplexers wherever it can route DS1 transmission over distinct facilities. Further, IDCMA asserts that the only other condition NYNEX perceives is that the multiplexers must be in separate rooms, which could be no more than office space divided by a partition. *Id.* at 2-3.

4. IDCMA states that it has filed an application for review of the *Waiver Order*. IDCMA argues for suspension of Transmittal 159 pending resolution of its application for review. *Id.* at 4-6. IDCMA also requests investigation of Transmittal 159. *Id.* at 3. After investigation, IDCMA avers that the Bureau should rescind the waiver and require NYNEX to unbundle the customer-premises multiplexer from Enterprise Service. Alternatively, IDCMA contends that the Commission should investigate the degree to which NYNEX complies with the *Waiver Order*. *Id.* at 3-4.

5. NYNEX responds that its tariff changes filed under Transmittal 159 are consistent with the provisions of the *Waiver Order*. NYNEX Reply at 3. Further, NYNEX argues that the issues raised by IDCMA are properly considered in the application for review process and not as a petition for suspension and investigation. *Id.* at 3-4. Therefore, NYNEX requests that the Bureau deny IDCMA's petition. *Id.* at 4.

6. NYNEX subsequently filed Transmittal No. 170, which, *inter alia*, clarifies its language concerning the 22 channel limit. The revised language provides that "[a] single customer may receive a maximum of twenty-two NYNEX Enterprise Service DS0 channels at the customer premises." The transmittal also provides language that prohibits customer access to the Enterprise Service provided multiplexing equipment. Finally, the transmittal specifies the network management functions provided under Enterprise Service.

7. The Common Carrier Bureau has reviewed NYNEX Transmittals 159 and 170, and all associated pleadings. We conclude that IDCMA has presented no question that warrants investigation at this time.

8. Accordingly, IT IS ORDERED that the petition to suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 127, filed by the Independent Data Communications Manufacturers Association, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

[1] NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 127, DA 93-60, (released Jan. 21, 1993) (*Waiver Order*). *See* 47 C.F.R. § 64.702(e) (prohibiting the bundling of customer premises equipment and tariffed common carrier services).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 12, 1993

COMMENTS INVITED ON TENNESSEE PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Tennessee (Region 39).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 39 consists of the state of Tennessee. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 21, 1993** and reply comments on or before **May 6, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-58 Tennessee-Public Safety Region 39.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-50

In the Matter of

The Accounting and Ratemaking Treatment for the Allowance for Funds Used During Construction (AFUDC)

NOTICE OF PROPOSED RULEMAKING

Adopted: March 2, 1993; Released: March 22, 1993

Comment Date: May 13, 1993
Reply Comment Date: May 28, 1993

By the Commission:

I. INTRODUCTION

1. On January 11, 1991 the Ameritech Operating Companies (Ameritech) filed a Petition for Rulemaking requesting that the Commission modify its existing rule that requires carriers to use the compound prime rate of interest to calculate the Allowance for Funds Used During Construction (AFUDC). Ameritech proposes the use of the authorized rate of return instead of the prime rate.[1] A Public Notice was issued soliciting comment on the petition on February 15, 1991. Four parties favor initiating a rulemaking to consider the proposed modifications, and one party opposed.[2] After consideration of these filings, we propose to modify our Rules in Part 32, Uniform System of Accounts for Telecommunications Companies (USOA), and Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, concerning AFUDC capitalization for both accounting and ratemaking purposes. In this Notice of Proposed Rulemaking (NPRM) we set forth a proposal to modify Parts 32 and 65 and seek comments thereon, as well as on alternative proposals.

II. BACKGROUND

2. The issue before us is the proper accounting and ratemaking treatment for asset construction-related funds during the period before the assets are placed in service. For ratemaking purposes the Commission has recognized three general regulatory approaches to provide compensation to investors for the funds they provide for plant construction:

> **Capitalization Method.** Exclude plant under construction from the rate base, but capitalize an allowance for interest on such plant under construction (ie., AFUDC) by including it in the cost of construction. When plant is put into service, the cost of construction, including the capitalized AFUDC, is included in the rate base, and the AFUDC cost is recovered through depreciation.
>
> **Rate Base Method.** Include plant under construction in the rate base and do not capitalize AFUDC.
>
> **Revenue Requirement Offset Method.** Include plant under construction in the rate base and recognize AFUDC as part of the cost of construction. Since plant under construction is included in the rate base, the amount of AFUDC capitalized is included in income for ratemaking purposes, and, thereby, serves to offset the revenue requirement determination for the development of rates for services.

3. In 1967 in Docket 16258 the Commission required the Revenue Requirement Offset Method for ratemaking for AT&T and the Bell System companies.[3] In 1977 in Docket 19129 the Commission concluded that long-term projects (projects under construction a year or longer) generally benefit only future ratepayers and found, therefore, that they should not be paid for by current ratepayers. Considering this, the Commission specified the Capitalization Method for compensating investors for the funds used for long-term construction. For short-term construction (projects under construction less than a year) the Commission decided that, because the duration of the construction period is relatively short and most current ratepayers will also be ratepayers when these construction projects are completed, it was neither practical nor necessary to distinguish between these current and future ratepayers. Accordingly, the Commission decided to specify the Rate Base Method for short-term construction.[4] The approaches specified in Docket 19129 for ratemaking are still in effect today.

4. In the Docket 19129 proceeding the Commission also established the prime rate[5] as the appropriate rate for accrual for AFUDC on long-term construction projects for AT&T and the Bell System. The Commission found that the Bell System companies at the time were being charged

[1] The prime rate is usually defined as the lowest rate of interest charged by a lender to its best customers for short-term unsecured loans.

[2] The parties that filed comments in favor are BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth); New York Telephone Company, and New England Telephone and Telegraph Company (NYNEX); Southwestern Bell Telephone Company; and The United States Telephone Association. MCI Telecommunications Corporation (MCI) filed comments in opposition to initiating a rulemaking. NYNEX and MCI also filed reply comments.

[3] American Telephone and Telegraph Co., *Interim Decision and Order*, 9 FCC 2d 30 (1967), *recon.*, 9 FCC 2d 960 (1967).

[4] American Telephone and Telegraph Co., *Phase II Final Decision and Order*, 64 FCC 2d 1 (1977) (*Docket 19129*), *recon.*, 67 FCC 2d 1429 (1978).

[5] The Commission specified that interest during construction be computed at a compounded annual rate that is based on a 13 month average of the prime rate. *Docket 19129* at 59.

the prime rate by financial institutions for their short-term debt and promissory notes and that nearly one-fourth of AT&T's construction budget could be funded by the short-term debt it carried. The Commission concluded that AT&T could fund a greater share of its construction program with short-term debt at the prime rate and, consequently, that it would be unreasonable to burden future ratepayers with interest charges for long-term construction in excess of the prime rate.[6] Moreover, the Commission concluded that investors are not necessarily entitled to receive the prescribed rate of return on such projects until they are placed in service.[7]

5. In 1978 in Docket 21230[8] the Commission amended the USOA to accommodate the Docket 19129 ratemaking decisions. It divided the plant under construction account into a short-term subdivision and a long-term subdivision.[9] The Commission did not specify an accrual rate for AFUDC for accounting purposes.

6. In 1985 the Commission revisited the accounting for AFUDC in Docket 84-469.[10] In that proceeding the Commission established a policy to adopt generally accepted accounting principles (GAAP) in the USOA to the extent possible consistent with regulatory needs. In implementing that policy the Commission considered, but did not adopt, the GAAP standard for capitalization of AFUDC. The GAAP standard essentially requires that AFUDC be accrued at a rate based on the actual cost of debt.[11] The Commission decided not to adopt GAAP with respect to this issue because the prime rate prescribed by the Commission for ratemaking and the actual cost of debt required under GAAP were not materially different.

7. Thereafter, Illinois Bell, an Ameritech subsidiary, attempted to raise the AFUDC issue in the Docket 86-497 rate base proceeding.[12] On reconsideration in that Docket, Illinois Bell objected to the use of the prime rate for ratemaking, but the Commission declined to address the matter on the merits because the matter was not properly before it.[13] Illinois Bell subsequently appealed this ruling to the United States Court of Appeals for the District of Columbia Circuit along with other rate base issues. The court found that the Commission was on solid ground in refusing to expand the scope of its proceeding and advised Illinois Bell that it should petition the Commission in the usual manner if it wanted the AFUDC rationale reconsidered.[14]

III. PETITION SUMMARY, COMMENTS AND REPLIES

8. Ameritech proposes that we modify the accounting requirements for AFUDC in Section 32.2000(c)(2)(x) of our Rules, to specify that the AFUDC rate for a local exchange carrier shall be the prescribed rate of return last authorized for that carrier by the Commission. In addition, Ameritech requests that we modify Section 65.820(a) of our Rules to specify that the AFUDC for assets included in the rate base and summarized in Account 2001, Telecommunications Plant in Service, shall be computed in accordance with Section 32.2000(c)(2)(x). In effect these changes would set the rate for AFUDC capitalization on long-term construction for both accounting and ratemaking at the Commission authorized rate of return.

9. Ameritech claims that the requested amendments are necessary to resolve several inconsistencies in our Rules. First, Ameritech claims that circumstances have changed since 1977 and that construction is not financed through short-term borrowing at the prime rate alone, but through a combination of debt and equity. Considering this, Ameritech claims that AFUDC accrued at the prime rate is below the cost of funds used for construction.[15] Second, Ameritech observes that to the extent that short-term borrowings may be used to fund construction projects, these funds and the associated interest cost are also reflected in the capital structure and debt cost used by the Commission in prescribing the overall rate of return.[16] Third, Ameritech contends that the use of the prime rate is inconsistent with the Commission's policy of encouraging carriers to invest in the telecommunications infrastructure. Ameritech asserts that if greater returns can be earned elsewhere, there is little incentive to reinvest internally generated funds in the regulated business.[17]

10. In opposition, MCI contends that Ameritech's proposal is unnecessary and in conflict with the Commission's policy. MCI claims that the Commission has repeatedly required "reasonable interest" as the appropriate bench-

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[6] *Docket 19129* at 59.

[7] *Docket 19129* at 60.

[8] In the Matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, *Report and Order*, 68 FCC 2d 902 (1978) (*Amendment of Part 31*). (The USOA in Part 31 was replaced by the USOA in Part 32 effective January 1, 1988.)

[9] This division is continued under the new USOA in Part 32 as separate accounts: Account 2003, Telecommunications Plant under Construction-Short Term, and Account 2004, Telecommunications Plant under Construction-Long Term.

[10] In the Matter of Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles (Parts 31, 33, 42, and 43 of the FCC's Rules), *Report and Order*, 102 FCC 2d 964 (1985) at 44-47 and 90-92.

[11] Statement of Financial Accounting Standards No. 34 (SFAS 34), Capitalization of Interest Cost, states: "If an enterprise's financing plans associate a specific new borrowing with a qualifying asset, the enterprise may use the rate on that borrowing.... If average accumulated expenditures for the asset exceed the amounts of specific new borrowings associated with the asset, the capitalization rate to be applied to such excess shall be a weighted average of the rates applicable to other borrowings of the enterprise." Under GAAP, an enterprise's current accrual for AFUDC cannot exceed the total amount of interest cost it incurs in the period.

[12] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989) (*Rate Base Reconsideration Order*), *remand sub nom.*, Illinois Bell Tel Co v. FCC, 911 F.2d 776 (1990) (*Illinois Bell*), *Decision on Remand*, 7 FCC Rcd 296 (1991).

[13] *Rate Base Reconsideration Order*, 4 FCC Rcd at 1703.

[14] *Illinois Bell*, 911 F 2d at 782-83.

[15] Ameritech Petition, pp. 6-8.

[16] Ameritech Petition, p. 8. Agreeing with Ameritech on this point, BellSouth contends that this constitutes a flaw in the Commission's Docket 19129 decision because the Commission, in assuming that the same short-term borrowings used for funding construction are also available to fund other corporate operations, double counts the effect of low-cost, short-term debt--once in applying it to AFUDC and a second time in applying it to the funding of operations. *See*, BellSouth Comments, pp. 2-3.

[17] Ameritech Petition, pp. 9-10, *citing Bessemer & Lake Erie R.R. Co. v. ICC*, 691 F.2d 1104, 1111 (3rd Cir. 1982).

mark and that Ameritech's analysis of the actual source of funding is irrelevant to a determination of a reasonable interest rate.[18] With respect to the allegation that short-term financing is counted twice, MCI responds that the Commission specifically considered the impact of short-term financing for construction by the telephone companies and found that short-term financing could be increased to finance a larger portion of construction without changing the overall cost of capital. MCI claims, therefore, that the Commission specifically considered the issue and found that the adjustment recommended by BellSouth was simply unnecessary because of the *de minimis* impact on the overall cost of capital.[19] As for Ameritech's claim that AFUDC at the prime rate does not provide adequate incentive for infrastructure development, MCI observes that Ameritech did not indicate that it was having difficulty attracting investors or funding long-term construction under the current provisions and that, to the contrary, Ameritech's long-term construction exceeded $2 billion over the last few years. Further, MCI contends that the Commission effectively considered the incentive issue in Docket 19129 and recognized that the use of the prime rate encourages companies to complete construction as expeditiously as possible.[20]

11. To support its claim that the Commission-authorized rate of return should be used for AFUDC, Ameritech observes that the Commission has stated that the rationale for AFUDC is "to compensate investors for the full cost of construction."[21] Ameritech states further that at least one court has agreed that "AFUDC is intended to compensate investors for the use of their funds during construction."[22] Ameritech claims that the full cost includes the cost of capital incurred by the telephone companies to finance construction projects. Thus, Ameritech contends, since the Commission and the courts have articulated that AFUDC accrual is intended to allow investors to recover the full cost of construction, the use of the prime rate is inconsistent with the articulated rationale. In light of how financing is actually being done, it contends, the overall rate of return is the rate that should be used for AFUDC accrual.[23] MCI counters that Commission statements for "full cost" compensation are taken out of context.[24] At the same time, MCI claims, Ameritech ignores the Commission's direct statements on the matter in the Docket 19129 proceeding where "reasonable interest" was established as the appropriate benchmark for AFUDC accrual.[25]

12. In its response to Ameritech, NYNEX argues that a standard consistent with GAAP would be appropriate for both Commission ratemaking and accounting purposes. NYNEX says this can be accomplished by (1) requiring accrual of AFUDC on long-term construction at a carrier's cost of debt, (2) including plant under construction long-term in the rate base, and (3) including the capitalized AFUDC as interest income in the determination of earnings. This treatment, contends NYNEX, provides an appropriate balance between cost recovery and ratepayer interests, and it is consistent with the Commission's policy to adopt GAAP wherever possible.[26]

IV. DISCUSSION

13. Considering Ameritech's petition and the comments thereon, we have tentatively decided that amendment of our accounting and ratemaking rules related to AFUDC is in order.

14. Ameritech's petition claims that our current requirement that AFUDC be computed at the prime rate for ratemaking purposes is unfair to investors. It proposes that AFUDC be computed at the authorized rate of return. NYNEX notes, on the other hand, that the Ameritech proposal to compute AFUDC using the rate of return would be inconsistent with GAAP which specifies that AFUDC be computed using the cost of debt. NYNEX points out that in Docket 84-469 the Commission adopted a policy of adopting GAAP in the accounting rules to the extent possible consistent with regulatory needs. NYNEX further states that, through use of the Revenue Requirement Offset Method, it is possible to achieve the fairness to investors sought by Ameritech and the adoption of GAAP consistent with the Commission's general accounting policy.

15. Consistent with the policy set in Docket 84-469, we prefer the use of GAAP in our accounting rules. We prefer also that our ratemaking requirements be consistent with our accounting rules. Such conformity will enhance the utility of the data reported for regulatory purposes. Further, a single method that is consistent with GAAP can be expected to simplify accounting and reduce carrier record-keeping and reporting burdens associated with this issue.

16. Toward this end, NYNEX proposed use of the Revenue Requirement Offset Method for long-term construction. As proposed by NYNEX, AFUDC would be capitalized on long-term construction at the cost of debt and the amount capitalized during any period would be recognized as income and would be an offset to the revenue requirement for that period. NYNEX, however, proposes capitalization of AFUDC at the cost of debt for long-term construction only; NYNEX did not propose any change for the short-term portion. But, under GAAP there is no long-term/short-term distinction, and the changes proposed by NYNEX, therefore, would not provide an AFUDC capitalization methodology that is fully consistent with GAAP.

17. In the interest of attaining full adoption of GAAP for AFUDC capitalization, we modify the NYNEX proposal. In this notice we propose changes to our Rules that would require the use of the Revenue Requirement Offset Method for both long-term and short-term construction and that would provide for interest capitalization according to the GAAP requirements, as stated in SFAS 34 and its amendments.[27] In the Appendix to this notice we propose the

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[18] MCI Comments, pp. 5-7; MCI Reply, p. 2.
[19] MCI Reply, pp. 2-3.
[20] MCI Comments, p. 8; MCI Reply, p. 3.
[21] Ameritech Petition, p. 9, *citing Rate Base Reconsideration Order*, 4 FCC Rcd at 1703.
[22] Ameritech Petition, p. 9, *citing Illinois Bell*, 911 F.2d at 782.
[23] Ameritech Petition, pp. 8-9.
[24] MCI states that the Commission statement was taken from a Commission brief to the court on *Illinois Bell*, and that issue was not properly before the court.
[25] MCI Comments, p. 7.
[26] NYNEX Comments, pp. 4-6; NYNEX Reply, pp. 2-3.
[27] SFAS 34 has been amended by SFAS 42, Determining Materiality for Capitalization of Interest Cost; SFAS 58, Capitalization of Interest Cost in Financial Statements That Include Investments Accounted for by the Equity Method; and

following: (1) elimination of the long-term/short-term dichotomy for plant under construction, (2) capitalization of AFUDC at the cost of debt on all construction, (3) inclusion of all plant under construction in the rate base, and (4) application of the amount of AFUDC capitalized as a revenue requirement reduction for the period it is capitalized.

V. CONCLUSION

18. Upon consideration of the Ameritech petition and comments thereon, we propose to amend Parts 32 and 65 of our Rules. In this notice we seek comments on the proposed amendments as set forth in the Appendix as well as on alternative amendments. In conjunction with this, we delegate authority to the Chief, Common Carrier Bureau to request and obtain from the Regional Bell Operating Companies any data necessary to evaluate the possible revenue requirement impact of the proposed changes.

VI. PROCEDURAL MATTERS

19. *Ex Parte Rules - Non Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.106(a).

20. *Regulatory Flexibility Act.* We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate services affected by the proposed rule amendment generally are large corporations or affiliates of such corporations. The Secretary shall send a copy of this NPRM, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

21. *Comment dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.414 and 1.419, interested parties may file comments on or before May 13, 1993, and reply comments on or before May 28, 1993. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554.

22. For further information on this proceeding, contact the Accounting Systems Branch, Accounting and Audits Division, F.C.C., Room 812, 2000 L St., N.W., Washington, D.C. 20554, (202)-634-1861.

23. Authority for issuance of this NPRM is contained in Sections 4(i), 201-205, 219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 201-205, 219, and 220.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 CFR, Parts 32 and 65 are proposed to be amended as follows:

Part 32 - Uniform System of Accounts for Telecommunications Companies

1. The authority citation for Part 32 continues to read as follows:

Authority: secs. 4(i), 4(j) and 220 as amended; 47 U.S.C. 154(i), 154(j) and 220 unless otherwise noted.

2. Paragraph 32.2000(c)(2)(x) is revised to read as follows:

§ 32.2000 Instructions for telecommunications plant accounts.

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(c) ***

(2) ***

(x) "Capitalized interest cost" includes the cost of funds used during construction. Capitalized interest cost shall be charged to assets in Account 2003, Telecommunications Plant Under Construction, and, if appropriate under generally accepted accounting principles, on suspended construction projects reclassified to Account 2006 (as provided in §32.2003(c)) as follows: If financing plans associate a specific new borrowing with an asset, the rate on that borrowing may be used for the asset; if no specific new borrowing is associated with an asset or if the average accumulated expenditures for the asset exceed the amounts of specific new borrowings associated with it, the capitalization rate to be applied to such excess shall be a weighted average of the rates applicable to other borrowings of the enterprise. The amount of interest cost capitalized in an accounting period shall not exceed the total amount of interest cost incurred

SFAS 62, Capitalization of Interest Cost in Situations Involving Certain Tax-Exempt Borrowings and Certain Gifts and Grants. In addition, other releases from the Financial Accounting Standards Board have included guidance on the capitalization of interest.

by the company in that period. Such amounts included in the cost of construction shall be credited to Account 7340, Interest Cost Capitalized.

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3. Section 32.2003 is amended by revising the section heading and paragraphs (a) and (c) to read as follows:

§ 32.2003 Telecommunications plant under construction.

(a) This account shall include the original cost of construction projects. (Note also §32.2000(c).)

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(c) If a construction project has been suspended for six months or more, the cost of the project included in this account shall be transferred to Account 2006, Nonoperating Plant, without further direction or approval of this Commission. If a project is abandoned, the cost included in this account shall be charged to Account 7370, Special Charges.

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4. Section 32.2004 is removed.

5. Section 32.7340 is revised in its entirety to read as follows:

§ 32.7340 Interest cost capitalized.

This account shall be credited with such amounts that are charged to plant accounts for the purpose of capitalizing interest cost. (See §32.2000(c)(2)(x).)

Part 65 -- Interstate Rate of Return Prescription Procedures and Methodologies

1. The authority citation for Part 65 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat., 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.450(d) is revised to read as follows:

§ 65.450 Net Income.

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(d) Except for interest cost capitalized, reasonable charitable deductions and interest related to customer deposits, the amounts recorded as nonoperating income and expenses and taxes (Accounts 7300-7450) and interest and related items (Accounts 7500-7540) and extraordinary items (Accounts 7600-7640) shall not be included unless this Commission specifically determines that particular items recorded in those accounts shall be included.

3. Section 65.820(a) is revised to read as follows:

§ 65.820 Included items.

(a) *Telecommunications Plant.* The interstate portion of all assets summarized in Account 2001 (Telecommunications Plant in Service) and Account 2002 (Property Held for Future Use), net of accumulated depreciation and amortization, and Account 2003 (Telecommunications Plant Under Construction), and, to the extent such inclusions are allowed by this Commission, Account 2005 (Telecommunications Plant Adjustment), net of accumulated amortization. Any interest cost for funds used during construction capitalized on assets recorded in these accounts shall be computed in accordance with the procedures in §32.2000(c)(2)(x).

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Great Trails Broadcasting Corporation 8310-HTS

Licensee of Station WGTZ-FM
Eaton, Ohio

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1993; Released: March 22, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL), issued on September 18, 1992, for five thousand dollars ($5,000) against Great Trails Broadcasting Corporation (*"Great Trails"*), licensee of Station WGTZ-FM, Eaton, Ohio; and, (2) a response to the NAL filed October 16, 1992, requesting rescission of the forfeiture.

2. The NAL was issued to Great Trails for its apparent willful violation of Section 73.1206 of the Commission's Rules. The Commission determined that Great Trails had broadcast a telephone conversation on December 16, 1991, without first having informed the other party of the intended broadcast use of the conversation. The facts are set forth in full detail in the Notice of Apparent Liability and will not be repeated here.

3. In addition to reiterating arguments already disposed of in the Notice of Apparent Liability, Great Trails submits that the five thousand dollar ($5,000) forfeiture is excessive and that, at most, the Commission should issue an admonishment. Great Trails contends that the Commission mechanically issued the forfeiture and did not consider the following circumstances: (1) complainant filed the complaint not because of harm she suffered but to harass the station and to obtain information from the licensee; (2) the Commission reduced other forfeitures where there were good faith efforts to comply with the Commission's rules and the Commission should reduce this forfeiture for the same reasons, *see Channel 36 Licensee Corporation, Television Station WATL*, 7 FCC Rcd 6541 (1992) (*"WATL"*); (3) the rule's intent was followed because there was no intent to deceive the complainant as to the nature of the conversation in the brief exchange that took place before the employee informed the complainant that they were on the air.

4. We conclude that Great Trails' arguments do not warrant a reversal of the Bureau's decision to impose a five thousand dollar ($5,000) forfeiture. We reject Great Trails' contention that we mechanically issued it a five thousand dollar ($5,000) forfeiture. We issued a forfeiture in the amount suggested by the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA V. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), which considers such factors as the nature and gravity of the offense and recommends a forfeiture of twenty percent (20%) of the maximum amount allowed. We found no circumstances warranting a deviation from that amount.

5. As to Great Trails' specific arguments, we do not think it appropriate to reverse or reduce the forfeiture because of the possible motives of the complainant. Additionally, as to the argument that, based on *WATL*, we should reduce Great Trails' forfeiture because of good faith and compliance with the rule's intent, the two cases are distinguishable. In *WATL*, the Commission reduced the forfeiture amount because the licensee acted in good faith and, although the announcement technically violated the Commission's sponsorship identification rule, it did not violate the rule's intent. The announcement did not identify its sponsored status with the words "sponsored by" or "paid for by." However, it did say that the program was "presented by." Furthermore, a second announcement indicated that the distributor paid for the announcement. Thus, the two announcements taken together informed the audience that the programming was from a non-station source and identified that source, which is consistent with the rule's intent.

6. As to compliance with the rule's intent, the complainant suffered precisely the harm the Commission's phone conversation rule is designed to prevent. That is, the rule's intent is to protect people's legitimate expectations of privacy in phone conversations and to give them an opportunity to decline to speak on the air. For this reason, the Commission has strictly interpreted Section 73.1206. The Commission has, in fact, long held that brief exchanges between the caller and the recipient, even saying "Hello" before the caller informs the recipient of the intent to broadcast the call or that they are on the air, violate Section 73.1206. *See Broadcasting-Contemporary, Inc., Radio Station WKTQ*, 52 FCC 2d 1005 (1975); *Western Broadcasting Co., Radio Station KKEY*, 38 FCC 2d 1195 (1972). *See also Report and Order Broadcast of Telephone Conversations*, 3 FCC Rcd 5461 (1988).

7. Based on the record, it is clear that Great Trails violated Section 73.1206 of the Commission's Rules by broadcasting a telephone conversation without first informing the called party that it was being broadcast.

8. Accordingly, pursuant to Section 503(b) ofthe Communications Act of 1934, as amended, IT IS ORDERED that Great Trails Broadcasting Corporation, Eaton, Ohio, FORFEIT to the United States the sum of five thousand dollars ($5,000) for its willful violation of Section 73.1206 of the Commission's Rules. The payment should be in the form of a check or similar instrument, payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSIONN

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GRAPHIC SCANNING CORP. File No. 23940-CD-TC-1-91

For Transfer of Control of
Radio Relay Corp., licensee
of PLMS Stations KAA893,
KAF250, and KNKL387 at various
locations in Missouri

ORDER ON RECONSIDERATION

Adopted: March 9, 1993; Released: March 22, 1993

By the Chief, Common Carrier Bureau:

1. The Mobile Services Division (MSD), pursuant to delegated authority, granted the transfer of control of Radio Relay Corp.-Missouri, Inc. (RRC),[1] licensee of PLMS Stations KAA893, KAF250, and KNKL387 in Missouri, from Graphic Scanning Corp. (Graphic) to BellSouth Enterprises, Inc. (BellSouth).[2] Communications Specialists, Inc. (CSI) has filed a motion for stay and a petition for reconsideration of the MSD's action. For reasons discussed below, we deny CSI's motion and its petition.

2. CSI identifies itself as the largest reseller of RRC's common carrier paging service in the St. Louis, Missouri, metropolitan area and an agent/reseller of RRC's service for the past three years. CSI asserts that new facts have come to its attention concerning RRC's and Graphic's anticompetitive practices, as well as the actions of BellSouth, that warrant setting aside the subject grant. CSI also asks that the MSD stay our action granting the transfer of control, pending our review of CSI's petition for reconsideration. CSI maintains that a stay is merited, pursuant to *Arizona Mobile Telephone Company*, 66 FCC 2d 691 (1977), because its complaint is likely to prevail on the merits, there will be no harm to third parties if a stay is granted, the public interest will be served by issuance of a stay order preserving the status quo pending review of CSI's allegations, and, in the absence of a stay, CSI will suffer irreparable harm.

3. In its petition for reconsideration, CSI alleges that RRC is unlawfully interfering with CSI's paging business and that RRC, Graphic, and BellSouth (collectively, Applicants) are attempting to reduce or even eliminate competitive resale paging services in the St. Louis market. According to CSI, RRC has failed to abide by the terms of its service contract with CSI, and misused confidential information and unfair service rates to steal away CSI's customers. CSI says that it did not file an objection against the transfer of control of RRC earlier because the unlawful and anticompetitive conduct alleged was not apparent until the 30-day statutory protest period for the subject application had passed.[3]

4. In opposition, Graphic, RRC, and BellSouth (collectively, Applicants) assert that CSI's petition must be denied because CSI lacks standing as a party in interest, its allegations are without merit, and it raises private contractual claims, which are unrelated to the transfer of control of RRC from Graphic to BellSouth.

I. DISCUSSION

5. Section 405 of the Communications Act of 1934 imparts standing to any person aggrieved or whose interests are adversely affected by Commission action. CSI alleges that from the time that the subject application was granted the parties have conspired illegally to undercut CSI's fees for paging service and thereby drive it out of business. Therefore, CSI submits, it will suffer irreparable harm if the transfer of control is allowed to stand. Based on the allegations presented, we find that CSI has made a sufficient case to impart standing to seek reconsideration. *See, e.g., Straus Communications v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976).

6. However, on the merits, CSI relies on facts that have not been established, and it misinterprets the Commission's Rules, policies, and statutory mandates. CSI contends that the subject transfer of control should be set aside because RRC has violated a binding agency agreement it has with CSI. According to CSI, RRC breached the agreement because it misused confidential information, which it acquired through their contractual relationship, to persuade CSI customers to take their paging service directly from RRC. Then claims CSI, RRC further violated the terms of the agency agreement by failing to pay CSI a stipulated $400 for each CSI customer it acquired. Applicants, however, respond to these allegations by asserting that RRC and CSI are not contractually bound to each other, and by pointing out that CSI has failed to produce a copy of the alleged agreement. Furthermore, Applicants note that their assertions are not refuted by CSI.

7. While these matters may be of importance between the parties, they have no bearing on our analysis of whether we were correct in allowing BellSouth to acquire control of RRC from Graphic. The misconduct charged by CSI allegedly took place after the subject transfer of control was authorized. Furthermore, the Commission has repeatedly held that contractual disputes involving licensees are beyond its purview and that these matters should be resolved by negotiation or through the courts. *See, e.g., Metromedia Company*, 3 FCC Rcd 595 (1988); *James F. Rill*, 60 RR 2d 583 (1986); *Ninety-Two Point Seven Broadcasting, Inc.*, 55 RR 2d 607 (1984).

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[1] RCC's name is now Digital Mobile Communications Missouri, Inc.

[2] The subject application is one of many that were granted by the MSD, allowing Graphic to transfer control of numerous PLMS facilities across the Nation to BellSouth. *See* Public Notice, Report No. PMS-91-45-A (released Aug. 7, 1991).

[3] Pursuant to Section 22.30(a)(4) of the Commission's Rules, the deadline for filing formal objections to the subject application was May 30, 1991. CSI did not voice its opposition until it filed its petition for reconsideration on September 9, 1991. We therefore view its petition as an informal objection under Section 1.41 of the Commission's Rules.

8. Next, CSI alleges that Applicants have engaged in a concerted effort to drive CSI and other resellers out of business by underpricing RRC's services. CSI's allegation ignores the Commission's established policy of open entry for the provision of paging services, which practically assures that no single carrier has dominant facilities based market power. *See, e.g., Metromedia, supra; Report and Order*, 95 FCC 2d 769 (1983); *Preemption of State Entry*, 59 RR 2d 1518 (1986). In fact, the St. Louis market has five common carriers and one private carrier currently offering paging service.[4] Indeed, RRC holds only 16 percent of the market. Given RRC's small share of the St. Louis market, we are not convinced by CSI's allegation that RRC, whether controlled by Graphic or BellSouth, poses a credible anticompetitive threat.

9. Likewise, the facts presented by CSI do not support its claim that RRC has attempted to engage in predatory practices. CSI accuses RRC of pricing its paging services below cost, but fails to offer evidence of RCC's actual costs. In fact, it offers no more than the allegation that RRC currently provides paging services at a rate of $7.00 per pager per month. However, CSI reveals that it pays between $4.00 and $6.00 per month for the paging services it receives from RRC. Responding to CSI's allegation, Applicants submit that the $7.00 per month rate is neither new nor below cost. They explain that RRC began charging St. Louis police departments a $7.00 per month bulk rate about three years ago when RRC submitted a winning bid for police business. Applicants contend that the $7.00 rate is compensatory, noting that it is higher than the rates paid by CSI, which are also compensatory. Moreover, Applicants note that RRC recently lost some of its customers to Metromedia, which is providing service at $5.00 per month. We do not believe that CSI has presented a *prima facie* showing of anticompetitive behavior.[5]

10. CSI's motion for stay is also unavailing. CSI has not shown a public interest detriment or that it would suffer an irreparable harm if the motion for stay is denied. Nor has CSI demonstrated that a stay would not result in injury to other interested parties. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). We therefore also deny its motion for stay.

II. CONCLUSION

11. In sum, we find that CSI has not alleged facts warranting stay or reversal of the subject transfer of control. We therefore affirm the transfer.

III. ORDERING PARAGRAPHS

12. Accordingly, IT IS ORDERED THAT the petition for reconsideration filed by Communications Specialists, Inc., IS DENIED.

13. IT IS FURTHER ORDERED THAT the motion for stay filed by Communications Specialists, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[4] The four other common carriers are Pactel, Cybertel, Metromedia (Southwestern Bell), and American Paging. The private carrier is Page-Midwest. None of these competitors has lodged allegations of anticompetitive behavior against any of the Applicants.

[5] Should CSI have additional facts regarding this allegation, it may avail itself of the Commission's complaint process. *See* 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-578

In the Matter of

Amendment of Section 73.202(b),	RM-7492
Table of Allotments,	RM-7636
FM Broadcast Stations.	RM-7637
(Carlyle, Dix, Flora, and	RM-7638
Mount Vernon, Illinois) [1]	RM-7639

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1993; Released: March 23, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7147 (1990), issued in response to a petition filed by Pathways Broadcasting ("Pathways") seeking the allotment of Channel 244A to Mount Vernon, Illinois, as that community's third local FM service. In response to the *Notice*, Pathways filed comments restating its intention to apply for Channel 244A, if allotted to Mount Vernon. In addition, the following counterproposals were filed. Kenneth W. Kuenzie ("Kuenzie") filed a counterproposal requesting the allotment of Channel 244A to Dix, Illinois, as that community's first local FM service (RM-7636).[2] Carlyle Broadcasting Company ("CBC") and Carlyle Broadcast Associates ("CBA") each filed a counterproposal seeking the allotment of Channel 244A to Carlyle, Illinois, as that community's first local service (RM-7637, RM-7638). Flora Broadcast Associates ("FBA") filed a counterproposal requesting the allotment of Channel 243A to Flora, Illinois, as that community's second local service (RM-7639).[3] [4] FBA, CBA and H & R Communications, Inc. ("H & R"), licensee of Station WNOI(FM), Channel 280A, Flora, Illinois, filed reply comments.[5] The allotment proposals for Channel 244A at Dix, Carlyle, or Mount Vernon are mutually exclusive.

2. Kuenzie in his counterproposal urges the Commission to allot Channel 244A to Dix, Illinois. Kuenzie states that Dix is an incorporated community (population 446) located in Jefferson County (population 32,828).[6] Kuenzie claims that the allotment of Channel 244A to Dix would serve approximately 100,000 people.

3. CBA in its counterproposal states that Carlyle is a community of sufficient size and development to warrant its own radio station. CBA states that Carlyle (1980 U.S. Census population 3,388) is the county seat of Clinton, Illinois (1980 U.S. Census population 32,617). CBA argues that the Commission must compare the relative needs of Carlyle for a first local service and Mount Vernon for a fourth local service. CBA contends that Mount Vernon has two FM stations and three aural facilities licensed to it, whereas Carlyle does not have any local broadcast service. CBA states that the public interest would best be served by the allotment of Channel 244A to Carlyle, citing *Savannah, Missouri*, 4 FCC Rcd 7842 (1989); and *Cookville, Tennessee*, 61 RR 2d 257, 260 (1986). CBA restates it intention to apply for Channel 244A, if allotted to Carlyle. CBC in its counterproposal restates CBA's concerns and also states its intention to apply for Channel 244A if allotted to Carlyle.

4. CBA in its reply comments argues that although the community of Dix does not have a local broadcast service, Carlyle should be preferred over Dix because it is over ten times more populous than Dix. Thus, it asserts that Carlyle is the preferred community, citing *Monterey, Tennessee*, 55 RR 2d 611 (1984). CBA further states that Kuenzie has failed to supply the Commission with information adequate to establish that Dix is a community for allotment purposes.

5. After reviewing the proposals, we believe that the communities of Dix, Carlyle and Mount Vernon would be deserving of local aural transmission services. However, an engineering analysis reveals that there are no alternate Class A channels available for any community. Therefore, our decision will be based on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given on priorities (2) and (3)]

[1] The communities of Dix, Carlyle, and Flora have been added to the caption.

[2] We note that Kuenzie failed to verify his counterproposal pursuant to Section 1.52 of the Commission's Rules and therefore his counterproposal is procedurally defective. *See* 47 C.F.R. Section 1.52; *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Process*, 5 FCC Rcd 3910, n.41 (1990). Although we will dismiss this counterproposal due to the procedural defect, we comparatively considered this counterproposal and determined that even if the proposal was procedurally correct, the counterproposal would be denied on its merits. *See* paragraph 6, *infra*.

[3] Public Notice of the counterproposals was given on February 15, 1991, Report No. 1838.

[4] On November 24, 1992, FBA and H & R requested approval of a settlement agreement and the dismissal of FBA's counterproposal seeking the allotment of Channel 243A to Flora, Illinois, as a second local service. Therefore, we will dismiss FBA's counterproposal and all comments responsive thereto will not be discussed. In accordance with Section 1.420(j) of the Commission's Rules, FBA states that it will not receive compensation in excess of its legitimate and prudent expenses in filing its petition in exchange for the withdrawal of its petition.

[5] FBA and H&R's reply comments are moot, due to the withdrawal of FBA's counterproposal.

[6] All population figures are taken from the 1990 U.S. Census, unless otherwise noted.

The allotment of Channel 244A to Carlyle or Dix would provide a first local service to either community, fulfilling priority three, whereas the allotment of the channel to Mount Vernon would provide that community with a third FM, and fourth local, transmission service. Provision of an additional transmission service would fulfill priority four. Therefore, since the allotment of Channel 244A to Carlyle or Dix would serve a higher allotment priority than an allotment to Mount Vernon, we will deny the Mount Vernon proposal.

6. In determining whether Dix or Carlyle should receive the allotment, we have looked at other factors, such as the availability of reception service and populations. A Commission engineering analysis indicates that both communities are well-served by reception services.[7] In addition, we note that Carlyle (population 3,474) is significantly larger than Dix (population 456). Since each community is served by a number of stations, we believe the new allotment should be made to Carlyle as the larger of the two communities. *See, e.g., Bostwick and Good Hope, Georgia,* 6 FCC Rcd 6084 (1991); and *Three Oaks and Bridgman, Michigan,* 5 FCC Rcd 1004 (1990).

7. Channel 244A can be allotted to Carlyle in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.0 kilometers (4.3 miles) south, in order to "avoid a short-spacing to Station WCVS(FM), Channel 244A, Virden, Illinois.[8]

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 6, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Carlyle, Illinois	244A

9. The window period for filing applications will open on **May 7, 1993,** and close on **June 7, 1993**.

10. IT IS FURTHER ORDERED, That the petition for rule making filed by Pathways Broadcasting requesting the allotment of Channel 244A to Mount Vernon, Illinois (RM-7492) IS DENIED.

11. IT IS FURTHER ORDERED, That the petition for rule making filed by Kenneth W. Kuenzie requesting the allotment of Channel 244A to Dix, Illinois (RM-7636) IS DISMISSED.

12. IT IS FURTHER ORDERED, That the petition for rule making filed by Flora Broadcast Associates requesting the allotment of Channel 243A to Flora, Illinois (RM-7639) IS DISMISSED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[7] Carlyle receives service from Stations WMIX(FM), Mount Vernon, Illinois, WRXX(FM), Centralia, Illinois, and WGEL(FM), Greenville, Illinois. Carlyle will be able to receive future service from Channel 271B1, Mount Vernon, Illinois, and Station WDML(FM), Woodlawn, Illinois. Dix receives service from Stations WMIX(FM), Mount Vernon, Illinois, WRXX(FM), Centralia, Illinois, WJDB(FM), Salem, Illinois, and future service from Channel 271B1, Mount Vernon, Illinois and WDML(FM), Woodlawn, Illinois.

[8] The coordinates for Channel 244A at Carlyle are North Latitude 38-33-00 and West Longitude 89-21-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-47

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Latta, Marion, and Camden, South Carolina) — RM-8188

NOTICE OF PROPOSED RULE MAKING

Adopted: February 25, 1993; Released: March 23, 1993

Comment Date: May 13, 1993
Reply Comment Date: May 28, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Winfas of Belhaven, Inc. ("petitioner"), requesting the substitution of Channel 232C3 for Channel 232A at Marion, South Carolina, the reallotment of Channel 232C3 from Marion to Latta, South Carolina, as the community's first local aural transmission service, and the modification of Station WWPD's license to specify Latta as its community of license. To accommodate the Latta allotment, petitioner also requests that Channel 274A be substituted for Channel 232A at Camden, South Carolina, and that the license of Station WPUB-FM be modified to specify the alternate Class A channel.

2. Petitioner states that Latta is an incorporated community with a 1990 U.S. Census population of 1,565 persons. It has a mayor and town council, as well as numerous businesses, financial institutions, churches and civic organizations such as a Lions Club and Rotary Club. In addition, Latta has its own police and volunteer fire departments. Marion (population 7,658 persons), will not be deprived of local aural transmission service because FM Station WKSY, Channel 264C3, and AM Station WKXS, will remain licensed to the community.

3. We believe the public interest would be served by proposing the substitution of Channel 232C3 for Channel 232A at Marion, and its reallotment to Latta, since it could provide the community with its first local aural transmission service and enable Station WWPD to expand its coverage area. We will not issue an *Order to Show Cause* since Kershaw Radio Corporation, licensee of Station WPUB-FM, Camden, has agreed to the change in channel. Petitioner will be required to reimburse Kershaw Radio Corporation for the reasonable costs associated with the change of frequency.

4. Channel 232C3 can be allotted to Latta in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.7 kilometers (6.6 miles) northwest to avoid a short-spacing to unoccupied but applied-for Channel 231A, Kingstree, South Carolina, and Station WZKB, Channel 232A, Wallace, North Carolina. Channel 274A can be allotted to Camden in compliance with the Commission's minimum distance separation requirements at Station WPUB-FM's licensed transmitter site, which is 7.8 kilometers (4.8 miles) southwest of Camden.[1]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Camden, South Carolina	232A	274A
Latta, South Carolina	--	232C3
Marion, South Carolina	232A, 263C3	263C3

6. IT IS ORDERED, That the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making*, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station WPUB-FM, Camden, South Carolina, as follows: Kershaw Radio Corporation, P.O. Box 753, Camden, South Carolina 29020.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **May 13, 1993,** and reply comments on or before **May 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel to petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the*

[1] The coordinates for Channel 232C3 at Latta are North Latitude 34-25-33 and West Longitude 79-29-57. The coordinates for Channel 274A at Camden are 34-13-31; 80-40-44.

Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-535

In the Matter of

Amendment of Section 73.202(b),	RM-7520
Table of Allotments,	RM-7633
FM Broadcast Stations.	
(Bowling Green and Elizabethtown,	
Kentucky and Ferdinand, Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1993; Released: March 23, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 6649 (1990), issued in response to a petition for rule making filed by Daily News Broadcasting Company ("Daily News"), licensee of Station WDNS, Channel 252A, Bowling Green, Kentucky, proposing the substitution of Channel 252C3 for Channel 252A at Bowling Green, Kentucky, and the modification of Station WDNS(FM)'s license. Daily News filed comments and reply comments restating its intention to apply for Channel 252C3, if allotted. Hardin County Broadcasting Company, Inc. ("Hardin"), licensee of Station WQXE(FM), Channel 253A, Elizabethtown, Kentucky, filed a counterproposal requesting the substitution of Channel 252C3 for Channel 253A at Elizabethtown, Kentucky, and modification of the license for Station WQXE(FM). The upgrade at Elizabethtown, Kentucky, requires the substitution of Channel 227A for Channel 252A at Bowling Green, Kentucky.[1] In addition, Hardin requests the allotment of Channel 253A to Ferdinand, Indiana, as that community's first local service. In response to the counterproposal, Daily News and Hardin filed comments. Bristol Broadcasting Company, Inc. ("Bristol"), licensee of Station WKYQ(FM), Channel 227C1, Paducah, Kentucky, filed opposing comments.[2] Daily News also filed a "Motion for Extension of Time" to file comments.[3]

2. We issued a *Order to Show Cause*, 7 FCC Rcd 1763 (1992), to Daily News, the licensee of Station WDNS(FM), Channel 252A, Bowling Green, to demonstrate why its authorization should not be modified to specify operation on Channel 227A in lieu of 252A at Bowling Green. In response to the *Order to Show Cause*, Daily News filed comments.[4]

3. Hardin, in its counterproposal, states that the allotment of Channel 252C3 to Elizabethtown would provide that community with its first wide area coverage service. Hardin states that it will apply for the channel if allotted and relocate its current site to comply with the site restriction. Hardin asserts that in order for Channel 252C3 to be allotted to Elizabethtown, Kentucky, Channel 252A must be deleted from Bowling Green, Kentucky. Hardin contends that Channel 227A can be allotted to Bowling Green at Station WDNS(FM)'s existing site. Hardin also states that Bowling Green will not be deprived of a wide area coverage service, as there is a pending proposal in MM Docket 90-447 to upgrade Station WCBZ(FM) at Bowling Green to a Class C3 facility.[5] Hardin states that should Channel 227A be allotted to Bowling Green, Kentucky, it will reimburse the licensee, Daily News, for the reasonable costs of changing frequency. In addition, Hardin states that it will apply for Channel 253A, if allotted to Ferdinand, Indiana. Hardin argues that these proposals should be comparatively considered on the basis of population increase in the gain areas of the respective proposals. Hardin claims that the population within the gain areas of Station WQXE(FM), Elizabethtown, Kentucky, would be 56,416 persons and Station WDNS(FM), Bowling Green, Kentucky, would be 36,020 persons. Hardin contends that the difference of an additional 20,396 persons is substantial and provides the basis for finding that the Elizabethtown Class C3 proposal is superior to that of Bowling Green based on population gain alone, citing *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615 (1988). Hardin argues that when the additional public interest benefit of providing first local service to Ferdinand, Indiana, is taken into account, which will be made possible by the Elizabethtown upgrade, the benefits are more compelling.

4. Daily News asserts that the only comparison in this proceeding should be the conflicting Bowling Green and Elizabethtown upgrade proposals and that the comparison should be based on population gains predicted from each proposal.[6] Daily News states that the population within the

[1] Public Notice of the counterproposal was given February 15, 1991, Report No. 1838.

[2] Bristol filed opposing comments arguing that the substitution of Channel 227A for Channel 252A at Bowling Green, Kentucky, would conflict with its pending application (File No. BPH-901029IE) to relocate its transmitter site for Station WKYQ(FM), Channel 227C1, Paducah, Kentucky. However, Bristol was granted a construction permit on August 21, 1992, for Station WKYQ(FM), Channel 227C1, Paducah, Kentucky, at coordinates 37-02-56 and 88-36-52. Therefore, all comments in response to Bristol's comments are now moot and will not be discussed in this proceeding.

[3] The Motion for Extension of Time was granted March 4, 1991, 6 FCC Rcd 1532 (1991).

[4] After the record closed, Hardin filed a motion to accept response to reply comments and a motion for leave to file reply comments in response to Daily News response to the *Order to Show Cause*. Although Hardin's response was filed after the pleading cycle ended in this proceeding, we will consider it because this will provide a more complete record for resolution of this proceeding. *See* Section 1.425 of the Commission's Rules.

[5] Station WBZD(FM) (formerly Station WCBZ(FM)) was modified to specify operation on Channel 244C3 in MM Docket 90-447. *See Report and Order*, 6 FCC Rcd 3326 (1991). Station WBZD has been issued a construction permit for Channel 244C3 (File No. BPH-910918ID).

[6] Daily News asserts that the Ferdinand aspect of Hardin's counterproposals should not be considered in this proceeding. Daily News notes that the proposed Ferdinand channel is fully spaced to Station WDNS as presently licensed on Channel 252A and as proposed on Channel 252C3. Therefore, it argues that the proposal should be the subject of a separate *Notice of Proposed*

gain area of Station WDNS on Channel 252C3, Bowling Green, Kentucky, would be 40,561 persons, and Station WQXE on Channel 252C3 would be 38,797 persons. Daily News states the difference of 1,764 persons is a deciding factor in favor of its proposal.

5. In response to the *Order to Show Cause*, Daily News contends it should not be ordered to change channels because it has become firmly identified with its current channel in listeners' minds, and changing channels would have a "devastating impact" upon its station's ability to continue providing quality local programming for its listeners. It includes a statement from David White, General Manager of Station WDNS, in which he relates that the station has been identified with the channel for 19 years and has built up a great deal of good will by using that channel. He also states that loss of the channel could impair the quality of the station's programming. Daily News also states that the Commission should take into consideration its unblemished and continuous record of broadcast service to its community for 45 years. Daily News states that in order to provide night service to outlying farmers who could not receive critical weather and agricultural news on its AM signal prior to daytime hours, it was motivated to incur the expense and substantial risk of an FM station long before that service became truly viable. At that time, Daily News recognized that the FAA precluded a higher tower due to flight path considerations, and that its tower would be 28 feet shorter than it should be, and it would be located in an area with "hilly terrain" which would produce "dead spots." However, it states, it proceeded in the hope that it would be able to obtain a more competitive facility with increased power and a more advantageous transmitter site at a later date. That opportunity, it asserts, has been presented and is the subject of this rule making.

6. In response to the *Order to Show Cause* Hardin states that it has undertaken at its own expense to study the possibility of Station WDNS upgrading on Channel 227. Hardin contends that Channel 227C3 can be allotted to Bowling Green for use by Station WDNS in compliance with the Commission's minimum distance separation and principal community coverage requirements at coordinates 36-55-49 and 86-15-00. This reference point would require a transmitter site relocation. Hardin states that Daily News has already indicated it willingness to relocate its transmitter site to avoid FAA restrictions which limit the tower height. In addition, it states, if Daily News desires to continue to operate from its current licensed transmitter site, it may do so in compliance with Section 73.215 of the Commission's Rules. Furthermore, Hardin states that it has experienced two forced frequency changes during its history, and believes that it has not suffered loss of audience or confusion.

7. After reviewing the proposal before use, we believe that Bowling Green and Elizabethtown are deserving of wide coverage area FM stations. However, we are unable to grant both proposals. Therefore, our decision will be based on the allotment priorities set forth in *Revision of FM Assignment Policy and Procedures*, 90 F.C.C. 2d 88 (1982), which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[co-equal weight given to priorities (2) and (3)]

In examining the conflicting proposals, we find that the first three priorities do not apply in this case since neither of the allotments would provide a first or second full-time aural or a first local service. Therefore, we believe it appropriate to base our determination on priority four, other public interest matters. Priority four of the allotment criteria permits the Commission to compare the benefits offered by conflicting proposals for upgrades. We have conducted our own engineering and population analysis of the proposal to determine which would provide a new service to the largest population within the gain area of the predicted service contours. *See Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987), *aff'd in relevant part*, 4 FCC Rcd 3843 (1989), *aff'd in relevant part*, 6 FCC Rcd 1493 (1991).

8. After careful consideration of the results of our comparison analysis and the comments filed in this proceeding, we conclude that the Elizabethtown proposal should prevail. A comparison of the population totals indicates that the use of Channel 252C3 at Elizabethtown would provide service to an additional 42,600 people, while the use of Channel 252C3 at Bowling Green would provide service to an additional 37,759 people. Based on the larger population which would receive service (42,600 vs. 37,759), we find that the allotment of Channel 252C3 to Elizabethtown will better serve the public interest. *See e.g., Spring Grove and Preston, Minnesota and Mason City, Iowa*, 4 FCC Rcd 5738 (1989). Therefore, the petition filed by Hardin to substitute Channel 252C3 for Channel 253A at Elizabethtown, and the substitution of Channel 227A for Channel 252A at Bowling Green, Kentucky, shall be granted, and the petition filed by Daily News to substitute Channel 252C3 for Channel 252A at Bowling Green shall be denied. Grant of Hardin's proposal also permits the allotment of Channel 253A to Ferdinand, Indiana, as that community's first local FM transmission service.

9. We also conclude that Daily News' arguments against the substitution of its channel are unpersuasive. First, its claim of economic injury due to loss of "good will" is speculative outside the context of a sale of the station, and we would not even consider this a factor in determining reimbursement for the channel change. *See, e.g., Angola, et al., Indiana*, 6 FCC Rcd 1230, 1232 (1991). Second, with respect to FAA concerns, Daily News does not demonstrate that it could not operate on Channel 227A from its present location. Any limitations on its plans to upgrade in the future are not a consideration in this proceeding.[7]

Rule Making, citing *Morris and Pontiac, Illinois*, 6 FCC Rcd 26 (1991). We note that in the *Morris and Pontiac, Illinois*, proceeding, the proposals in conflict were not mutually exclusive. Here, the allotment of Channel 253A to Ferdinand, Indiana, is directly dependent on the deletion of Channel 253A at Elizabethtown. Therefore, we will consider the Ferdinand proposal herein.

[7] We make no determination with respect to Hardin's suggestion that Daily News may be able to obtain an upgrade on Channel 227A.

10. In view of the above information, we believe the public interest would be better served by the substitution of Channel 252C3 for Channel 253A at Elizabethtown, Kentucky, in order to provide that community with a wide area FM service. In accordance with Section 1.420(g) of the Commission's Rules, we will substitute Channel 252C3 for Channel 253A at Elizabethtown, Kentucky, and modify the license of Station WQXE(FM). In order to accommodate the Elizabethtown upgrade, we will substitute Channel 227A for Channel 252A at Bowling Green, Kentucky, and modify the license of Station WDNS(FM) to specify Channel 227A. Channel 252C3 can be allotted to Elizabethtown, Kentucky, with a site restriction 13.8 kilometers (8.6 miles) west of the city to meet spacing requirements to Station WKQQ(FM), Channel 251C1, Lexington, Kentucky.[8] Channel 227A can be allotted to Bowling Green, Kentucky, at Station WDNS(FM)'s current licensed transmitter site, with a site restriction of 10.3 kilometers (6.4 miles) northeast, in order to avoid a short-spacing to Station WKYQ(FM), Channel 227C1, Paducah, Kentucky.[9] We will also allot Channel 253A to Ferdinand, Indiana, as that community's first local FM service.[10]

11. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). Hardin has stated its intention to reimburse Daily News for its reasonable costs in changing frequency.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 6, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bowling Green, Kentucky	227A
Elizabethtown, Kentucky	252C3
Ferdinand, Indiana	253A

13. The window period for filing applications for Channel 253A at Ferdinand, Indiana, will open on **May 7, 1993,** and close on **June 7, 1993**.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Hardin County Broadcasting Company, Inc, for Station WQXE(FM), Elizabethtown, Kentucky, IS MODIFIED, to specify operation on Channel 252C3 in lieu of Channel 253A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the Daily News Broadcasting Company, license of Station WDNS(FM), Bowling Green, Kentucky, IS MODIFIED, to specify operation on Channel 227A in lieu of Channel 252A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorization except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

16. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Hardin County Broadcasting Company, Inc., licensee of Station WQXE(FM) is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

17. IT IS FURTHER ORDERED, That the petition for rule making filed by Daily News Broadcasting Company requesting the substitution of Channel 252C3 for Channel 252A at Bowling Green, Kentucky (RM-7520), IS DENIED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

[8] The coordinates for Channel 252C3 at Elizabethtown are North Latitude 37-40-10 and West Longitude 86-01-00.
[9] The coordinates for Channel 227A at Bowling Green are North Latitude 37-02-45 and West Longitude 86-21-53.
[10] The coordinates for Channel 253A at Ferdinand are North Latitude 38-09-45 and West Longitude 86-50-15.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-224

In the Matter of

Amendment of Section 73.202(b),	RM-8074
Table of Allotments,	
FM Broadcast Stations.	
(Dardanelle, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 2, 1993; Released: March 23, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 6478 (1992), issued in response to a petition filed on behalf of Ramsey Communications, Inc. ("petitioner"), licensee of Station KWKK(FM), Channel 272A, Dardanelle, Arkansas, proposing the substitution of Channel 272C3 for Channel 272A at Dardanelle, and modification of its license to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As stated in the *Notice*, Channel 272C3 can be allotted to Dardanelle, Arkansas, at the petitioner's present site,[1] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules. [2]

3. We believe the public interest would be served by substituting Channel 272C3 for Channel 272A at Dardanelle since it would provide the opportunity for an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Ramsey Communications, Inc. for Station KWKK(FM) to specify operation on Channel 272C3 at Dardanelle, Arkansas, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 6, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Dardanelle, Arkansas, as follows:

City	Channel No.
Dardanelle, Arkansas	272C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Ramsey Communications, Inc. for Station KWKK(FM), IS MODIFIED to specify operation on Channel 272C3 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Ramsey Communications, Inc., licensee of Station KWKK(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates at the authorized site of Station KWKK(FM) at Dardanelle are 35-13-41 and 93-15-20.

[2] The *Notice* stated that the Dardanelle proposal conflicts with the presently licensed operation of Station KLSZ-FM on Channel 272A at Van Buren, Arkansas. Pursuant to MM Docket No. 90-460, 56 Fed. Reg. 3786, January 31, 1991, the FM Table of Allotments was amended effective March 11, 1991, to reflect Channel 274C3 in lieu of Channel 272A at Van Buren. On February 18, 1993, LKR Communications, Inc., the licensee of Station KLSZ-FM was issued a license on Channel 274C3 (*see* File No. BLH-920720KA).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-49

In the Matter of

Amendment of Section 73.202(b), RM-8193
Table of Allotments,
FM Broadcast Stations.
(Los Lunas and Espanola, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 2, 1993; Released: March 23, 1993

Comment Date: May 13, 1993
Reply Comment Date: May 28, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Elliott McDowell ("petitioner") requesting the substitution of Channel 273C for Channel 273C2 at Los Lunas, New Mexico, and the modification of Station KOYT's license to specify the higher class channel. To accommodate the upgrade at Los Lunas, petitioner also requests that Channel 225C3 be substituted for Channel 272C3 at Espanola, New Mexico, and the license of Station KIOT be amended to specify the alternate Class C3 channel.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 273C for Channel 273C2 at Los Lunas, since it could provide the community with a higher class channel and enable Station KOYT to expand its coverage area. Channel 273C can be allotted to Los Lunas in compliance with the Commission's minimum distance separation requirements with a site restriction of 51.8 kilometers (32.2 miles) northeast to accommodate petitioner's desired transmitter site. Channel 225C3 can be allotted to Espanola with a site restriction of 16.2 kilometers (10.1 miles) northeast to avoid short-spacings to Stations KRWN, Channel 225C1, Farmington, and KRST, Channel 222C and KKOB-FM, Channel 227C, Albuquerque, New Mexico, and to accommodate petitioner's desired transmitter site.[2] As requested, we propose to modify the license of Station KOYT to specify operation on Channel 273C in lieu of its present Channel 273C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in Channel 273C at Los Lunas or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Espanola, New Mexico	272C3	225C3
Los Lunas, New Mexico	273C2, 292C1	273C, 292C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 13, 1993,** and reply comments on or before **May 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Barry D. Wood, Esq.
Jones, Waldo, Holbrook & McDonough, P.C.
2300 M Street, N.W.
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

[1] It is not necessary to issue an *Order to Show Cause* affording the licensee of Station KIOT at Espanola an opportunity to comment on the proposed modification of its authorization since the petitioner is the licensee of the station.

[2] The coordinates for Channel 273C at Los Lunas are North Latitude 35-12-42 and West Longitude 106-26-57. The coordinates for Channel 225C3 at Espanola are 36-04-41; 105-56-16.

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-79

In the Matter of

Amendments of Part 69
of the Commission's Rules
Relating to the Creation of
Access Charge Subelements for
Open Network Architecture

REPORT & ORDER

Adopted: March 8, 1993; Released: March 23, 1993

By the Commission:

I. INTRODUCTION

1. In this order we adopt the rule changes proposed in the *Supplemental Notice* in this proceeding to forestall unreasonably discriminatory pricing of future Open Network Architecture (ONA) services.[1] These rule changes require the Bell Operating Companies (BOCs) to make the same cost showings for ONA basic service elements (BSEs) they unbundle from existing services in the future as the BOCs did for the initial set of unbundled BSEs.[2]

II. BACKGROUND

2. In the *Part 69/ONA Order* we revised our rules to permit the BOCs to unbundle and federally tariff the BSEs listed in their amended ONA plans, as required by the *BOC ONA Amendment Order*.[3] Because we required the BOCs to maintain their existing bundled feature groups for a period of time after they initially offered the unbundled services, the unbundled services represented additional options, rather than simply substitutes, and thus were "new" services under the price cap rules.[4] Therefore, the BOCs were required to satisfy the cost showing requirements for new services for each of the unbundled BSEs they introduced.

3. We recognized that the BOCs have incentives to discriminate in the pricing of BSEs because BOCs may purchase some of the BSEs themselves and compete against customers that may purchase different BSEs. To enable us to detect and prevent unreasonably discriminatory behavior, we relied on the cost showings required under the new services test, and also imposed a requirement that BOCs "flag" or otherwise identify the BSEs that they expect to use in their enhanced service operations. The flagging requirement was designed to permit the Commission and interested parties to compare the prices of those BSEs used by BOCs with the prices of BSEs that the BOCs did not intend to purchase.[5]

III. DISCUSSION

4. *Proposal.* In the *Supplemental Notice*, we noted that after the initial ONA tariffs were filed, future BSEs might be either new or restructured services under price cap regulations. The *Supplemental Notice* tentatively concluded, however, that the general rules for restructured services would not provide sufficient protection against unreasonably discriminatory prices for future unbundled BSEs. Therefore, we tentatively concluded that we should place an additional restriction on future unbundled BSEs that qualify as restructured under the price cap rules. We proposed to require them to satisfy the new services test as well as the restructured services test.

5. *Comments.* Some LEC customers and the DC PSC argue that existing price cap rules for restructured services would not deter the type of discrimination most likely to arise with future unbundled BSEs. They argue that LECs possess the same market power over restructured ONA services that they do over new ONA services, and that LECs could intentionally overprice the BSA (used by all) and underprice BSEs (used primarily by themselves) as a form of "gaming." Customers also argue that LECs could use this market power to discriminate in favor of particular IXCs and ESPs over others. LEC customers argue that the Commission should subject unbundled restructured services to at least the new service pricing rules, if not rules even more stringent.[6]

6. The LECs, on the other hand, assert that the existing rules governing restructured services pricing provide sufficient protection against the possibility of discrimination.

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[1] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order* and *Supplemental Notice*).

[2] The cost showings required were most recently revised in Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, Memorandum Opinion & Order on Second Further Reconsideration, CC Docket Nos. 89-79 and 87-313, 7 FCC Rcd 5235 (1992).

[3] Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*).

[4] The *LEC Price Cap Order* defines new services as services that add to the range of options already available to customers. A new service may, but need not, include a new technology or functional capability. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6824 para. 314 (1990) and Erratum, 5 FCC Rcd 7664 (1990)(*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *pets. for further recon. dismissed*, 6 Rcd 7482 (1991) and Erratum, 7 FCC Rcd 1419 (1992), *modified on further recon.*, 7 FCC Rcd 5235 (1992), *pets. for further recon. pending, appeal docketed*, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[5] 6 FCC Rcd at 4532 para. 46.

[6] Ad Hoc Comments at 3,5; AT&T Comments at 3; GSA Comments at 4; IIA Reply at 3; MCI Comments at 6-8; WilTel Comments at 9-10; Ad Hoc Reply at 4,6; DC PSC Reply at 3-5; GSA Reply at 4-5; MCI Reply at 2,6-8.

LECs reiterate previous arguments that the new services test requirements are unreasonably restrictive and should not be used for new services and even more strenuously oppose the application of those rules to restructured services.[7] The LECs argue that it is unfair to change the price cap rules in the middle of the game, and that such changes are eroding the benefits that justified the cost of price caps.[8] NYNEX also claims that the Modification of Final Judgment (MFJ) precludes BOCs from subscribing to their own interstate ONA services for the provision of enhanced services and thus eliminates their incentive to engage in unreasonably discriminatory pricing of interstate BSEs.[9]

7. Ad Hoc, MCI, and WilTel ask the Commission to clarify that risk premiums will not be permitted for unbundled ONA services.[10] WilTel also criticizes the manner in which demand is recast under the restructured services test, and WilTel and IIC ask the agency to change the price cap rules to require the use of more recent demand data.[11] In reply, NYNEX and US West criticize WilTel's proposal as inappropriate, incorrect, and inconsistent with the existing price cap index methodology.[12] WilTel and Ad Hoc argue that the Commission should not create a significant distinction between ONA and non-ONA services,[13] and WilTel seeks clarification that the ONA flagging requirements apply to restructured services.[14] The DC PSC asks that states be allowed to evaluate and approve rates for restructured interstate ONA services if the states apply the relevant FCC standard.[15]

8. *Decision*. The Commission's ONA decisions imposed an obligation on each BOC to offer an initial set of ONA services and also a continuing requirement to unbundle BSEs that may be useful to enhanced service providers. In the *Part 69/ONA Order*, we established the showing required for tariffing the initial set of unbundled BSEs. We required the BOCs to provide information about direct costs and overhead loadings to support the initial price for each BSE and also required that the BSA and BSE prices satisfy a revenue neutrality constraint. We also imposed, on an ongoing basis, a flagging requirement for BSEs to enable the Commission and interested parties to track future deviations from the initial prices. We conclude that the tariff showing for future BSEs unbundled from existing services should be the same as the showing for the initial set of unbundled BSEs. Just as they did for the initial set of BSEs, carriers must provide showings of direct cost and reasonable overhead loadings. Carriers must also ensure revenue neutrality by adjusting their BSA rates when additional BSEs are unbundled from the BSA and must document any cost models they use.

9. LECs argue that setting initial BSE rates with reference to cost is inconsistent with price cap regulation, which focuses in the first instance on prices. While it is true that price cap regulation in large part avoids cost of service determinations, costs continue to play a limited role, *e.g.*, when setting initial rates for new services. When we decided to require that initial BSEs be treated for tariff support purposes as new services, we reasoned that this showing was required because of the special opportunities for discrimination in the initial pricing of BSEs, as noted by LEC customers. LECs deny that any danger of discrimination exists with respect to either the initial or future unbundled ONA services, but offer no new facts or analyses not considered in the *Part 69/ONA Order*. The LECs also offer no reasons for distinguishing between the initial and future unbundled ONA services. We conclude that the opportunities and incentives for LECs to price BSEs in an unreasonably discriminatory manner are no less with respect to the BSEs they will unbundle from existing services in the future than with respect to the initial set of BSEs they unbundled. Therefore, we conclude that it is in the public interest to require the BOCs to provide the same cost support they provided for their initial set of unbundled BSEs whenever they unbundle additional BSEs in the future.[16]

10. With respect to other issues, we reject the WilTel and Ad Hoc requests that we apply the rules for unbundled ONA services to unbundled non-ONA services. We find that ONA services, which are offered to LEC competitors, present a special risk of discrimination. We conclude that, absent such special circumstances, the revenue neutrality constraint of the restructured services test will ensure reasonable rates, and that for non-ONA services, except where otherwise specified by Commission order, the restructured test provides sufficient protection against discriminatory pricing.[17]

11. We confirm that the flagging requirements adopted for all BSEs in the *Part 69/ONA Order* apply to BSEs that result from future unbundlings. We also observe that it is unlikely that we would grant a risk premium for an unbundled restructured BSE, given that a risk premium can only be justified by a LEC showing that it has placed an investment at an unusually high risk of loss. Since restructured unbundled services would have already existed in a

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[7] Ameritech Reply at 2-3; Bell Atlantic Comments at 2-4; BellSouth Comments at 2; NYNEX Comments at 2, 5-6; Pacific Comments at 2; Rochester Comments at 3-5; SNET Comments at 2-3; SW Bell Comments at 4-5; USTA Comments at 2-4; US West Comments at 2; SW Bell Reply at 2.

[8] Ameritech Reply at 5, 7; Rochester Comments at 2; SNET Comments at 4; SW Bell Reply at 5; US West Comments at 4.

[9] NYNEX Comments at 4, citing *U.S. v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd, Maryland v. U.S.*, 460 U.S. 1001 (1983).

[10] Ad Hoc Reply at 7; MCI Comments at 9; WilTel Comments at 11.

[11] IIC Reply at 3; WilTel Comments at 8.

[12] NYNEX Reply at 5-6; US West Reply at 3-5.

[13] Ad Hoc Comments at 5; WilTel Comments at 15-17. Ad Hoc argues that if it is too difficult to distinguish between ONA and non-ONA services, both should be treated more strictly. Ad Hoc Reply at 6 n.5.

[14] WilTel Comments at 13.

[15] DC PSC Comments at 2-3.

[16] Although the unbundling of future BSEs from existing services would ordinarily be considered a restructure under price cap rules -- and thus would not require a cost showing -- the introduction of additional BSEs presents special circumstances because these are services that the Commission requires BOCs to provide to their competitors.

[17] We also reject WilTel's request that we alter the rules concerning the recasting of demand for restructured services under price caps. After careful consideration, we consciously chose the use of historical demand-based indexes over current demand-based indexes. *See* Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 4 FCC Rcd 2873, 3023 para. 308 and 3026 para. 315 (1989) (discussing the decision to employ Laspeyres indexes, which use historical demand, rather than Paasche indexes, which use current demand). WilTel offers no good reason to reverse this decision. And it would be inconsistent to employ current demand figures for restructured services and historical demand for the indexes.

bundled form, it would be difficult for a LEC to make a showing sufficient to justify earning a risk premium; it is more likely that a LEC would be able to justify a risk premium for an unusually risky new BSE. However, we will evaluate the appropriateness of any risk premium showings in the tariff review process. Finally, with regard to the DC PSC's request that we permit states to evaluate and approve rates in federal ONA tariffs, we note that we have adopted a dual tariffing regime for ONA services consistent with the general federal/state regulatory regime laid out in the Communications Act of 1934. This framework gives states control over the rates of ONA services filed in state tariffs, but places jurisdiction over federal ONA tariffs with this Commission.[18] Therefore, we deny the DC PSC's request.

12. In conclusion, we require that all future unbundled BSEs that qualify as restructured services under price caps must satisfy the test for new services and the flagging requirements for BSEs as well as the revenue neutrality test for restructured services.

13. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), and 405, Part 61 and Section 61.49 of the Commission's rules, 47 C.F.R. Part 61, § 61.49 IS AMENDED as set forth in Appendix A, effective on 90 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Part 61, is amended as follows:

PART 61 - TARIFFS

1. Section 61.49 is amended by revising the first sentences of paragraphs (g)(2) and (h) to read as follows:

* * * * *

(g)(2) Each tariff filing submitted by a local exchange carrier specified in § 61.41(a) (2) or (3) of this part that introduces a new service or a restructured unbundled basic service element (BSE) (as BSE is defined in § 69.2 (mm)) that is or will later be included in a basket must be accompanied by cost data sufficient to establish that the new service or unbundled BSE will not recover more than a just and reasonable portion of the carrier's overhead costs.

(h) Each tariff filing by a local exchange carrier specified in § 61.41(a) (2) or (3) of this part that introduces a new service or a restructured unbundled basic service element (BSE) (as BSE is defined in § 69.2 (mm)) that will later be included in a basket must be accompanied by

* * * * *

APPENDIX B

LIST OF COMMENTERS

1. Comments

1. Ad Hoc Telecommunications Users Committee (Ad Hoc Users)
2. American Telephone and Telegraph Company (AT&T)
3. Bell Atlantic telephone companies (Bell Atlantic)
4. BellSouth Telephone Companies, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)
5. District of Columbia Public Service Commission (DC PSC)
6. General Services Administration (GSA)
7. MCI Telecommunications Corp. (MCI)
8. NYNEX Telephone Companies (NYNEX)
9. Pacific Bell (Pacific)
10. Rochester Telephone Corporation (Rochester)
11. Southern New England Telephone Company (SNET)
12. United States Telephone Assoc. (USTA)
13. US West Communications (US West)
14. Williams Telecommunications Group (WilTel)

2. Reply Comments

1. Ad Hoc Users
2. Ameritech Operating Companies (Ameritech)
3. Bell Atlantic telephone companies (Bell Atlantic)
4. BellSouth
5. DC PSC
6. GSA
7. Information Industry Association (IIA)
8. MCI
9. NYNEX
10. Southwestern Bell Telephone Company

[18] Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order on Reconsideration, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3084, 3089 (1990) (*BOC ONA Reconsideration*).

(SW Bell)
11. USTA
12. US West
13. WilTel

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Applications of

John R. Benson

For Authority to Construct
and Operate Multichannel
Multipoint Distribution Service
Stations on E and F-group
channels at

	File Nos.
Cadillac, Michigan	1952-CM-P-83
Cheboygan, Michigan	1953-CM-P-83
Escanaba, Michigan	1954-CM-P-83
Gaylord, Michigan	1955-CM-P-83
Lansing, Michigan	1956-CM-P-83
Manistique, Michigan	1957-CM-P-83
Petosky, Michigan	1959-CM-P-83
Sault Ste. Marie, Michigan	1960-CM-P-83
St. Ignace, Michigan	1961-CM-P-83
Traverse City, Michigan	1962-CM-P-83

ORDER ON RECONSIDERATION

Adopted: March 11, 1993; Released: March 23, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Bureau are petitions for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced applications of John R. Benson (Benson) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E and F-group channels at the above-captioned locations were unacceptable for filing.

2. *Division Return.* The Division determined that Benson's applications were unacceptable for filing because each lacked the technical analysis required by 47 C.F.R. Sec. 21.901(d)(7). The omission of this information in Benson's applications rendered the applications incomplete and not in a "condition acceptable for filing." Therefore, Benson's applications were returned as unacceptable for filing, pursuant to Sec. 21.20(a) of the Rules.

3. *Pleading.* On reconsideration, Benson states that his applications did make reference to the requirements prescribed by Sec. 21.901(d)(7). In two sentences, Benson stated "[t]he ITFS band has been searched for a distance of sixty five miles from the proposed site. No co-channel or first adjacent channel ITFS facilities are currently proposed or authorized within that sixty five mile radius." Benson argues that this statement demonstrated sufficient compliance with Section 21.901(d)(7) because "the application showed how interference would be avoided by demonstrating none could exist. Moreover, Exhibit H also complies with Section 21.902(a) by demonstrating that interference would be avoided due to the lack of other facilities." Benson's Petition at 2.

4. *Discussion.* The arguments presented by Benson are without merit. Prior to the filing of any MMDS applications, including Benson's, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent channel stations.[1] To effectuate its decision, the Commission added 47 C.F.R. Sec. 21.901(d)(7) to the Commission's rules.[2] The Commission asked for the technical showing required by Section 21.901(d)(7) as a means of determining each MMDS applicant's awareness of the problems and technical competence to mitigate interference conflicts that might arise. *Advancom, Inc.*, (Comm. Car. Bur. Dec. 31, 1984). The consequences of failing to provide this demonstration was unequivocally stated:

> We stress again that we expect applicants to address this problem in their applications. Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.

MMDS Allocation Order, 94 FCC 2d at 1264. Thus, all applicants were required, at a minimum, to submit a generic statement of how they would resolve cochannel and adjacent channel interference that would likely be encountered when several MMDS stations began operation in the same area. *Advancom* at 3.

5. This interference protection showing is a significant requirement because the Commission, in reallocating spectrum from the Instructional Television Fixed Service (ITFS) to MMDS, did so with the understanding that certain adjacent channel interference problems might arise. *MMDS Allocation Order*, 94 FCC 2d at 1246.[3] Many of

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[1] Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 FCC 2d 1203, 1247, 1264 (1983)(hereinafter cited as MMDS Allocation Order).

[2] This rule provision requires each MMDS applicant to show how interference with the operation of adjacent channels would be avoided and to show what steps had been taken to comply with 47 C.F.R. Sec 21.902(a). Section 21.902(a) requires, *inter alia* MDS applicants to make exceptional efforts to avoid blocking *potential* adjacent channel use in the same city and cochannel use in nearby cities. (Emphasis added). To assist us in enforcing Section 21.902(a) "the applicant must explain what efforts it has made to comply with this section." Id. at 1264.

[3] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators are not colocated." Id. at 1264. "[T]he use of channels in one pair of an interleaved group [such as E-group] tends to preclude use of the other group [such as F-group] in the same area." Id. For this reason, the Commission emphasized that it would "require each applicant to include, as part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." Id. at 1247.

those commenting on the MMDS reallocation proposal expressed the view that such operation was not technically feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered. Also, Section 21.901(d)(7) was adopted because the Commission anticipated that some authorized cochannel stations would be spaced more closely than ordinarily would be allowed. Closely-spaced cochannel stations can be successfully operated but require careful planning and engineering.[4]

6. A prospective MMDS licensee's ability to provide interference protection to other cochannel or adjacent channel licensees was an integral part of the Commission's reallocation plan. Toward that end, the technical showing required by Section 21.901(d)(7) serves as a means of determining an applicant's awareness of potential interference problems and technical competence to offer MMDS by resolving potential interference problems with other cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed MMDS transmitter site.[5] This required demonstration is also necessary because cochannel and adjacent-channel MMDS station applications for the above-referenced applications and immediately adjacent areas were filed on the same day without the submission of interference analyses which are usually required for applications proposing cochannel and adjacent channel stations located within 50 miles or the radio horizon. As distinguished from the Section 21.901(d)(7) technical showing, the Commission waived the requirement that applicants, at the time of filing, submit a detailed actual interference study required by Section 21.902(c)(1), 47 C.F.R. § 21.902(c)(1). *Advancom* at 4. This section requires that applicants submit an analysis of the potential for harmful interference to *existing or to previously proposed stations* located within 50 miles of the proposed station. (Emphasis added). Thus, through the waiver of Section 21.902(c)(1), an MMDS applicant would not be required to show non-interference with existing and proposed cochannel and adjacent channels ITFS users until after a construction authorization has been granted. The Commission concluded that it would not serve the public interest to have *all* applicants file an interference study where only the study submitted by successful applicants would be considered by the Commission staff. *Id.*

7. At the time Benson filed his applications, he had notice that all MMDS applicants, at the time of filing, must submit a demonstration specifying the techniques the applicant would employ to avoid potential cochannel or adjacent channel interference. In the *MMDS Allocation Order*, the Commission described clearly the kind of information applicants must submit in order to justify their technical competence in resolving cochannel and adjacent channel interference. The reallocation order specifically described cross-polarization and frequency offset as two engineering techniques that could be used to minimize interference. *Id.* at 1264. Benson's applications lacked reference to minimizing interference to the MMDS stations at the above-captioned locations, or MMDS stations in nearby areas.

8. The *MMDS Allocation Order* prescribed the filing requirements to be observed by MMDS applicants. The order specifically stated that "all applications are expected to comply with all pertinent sections of Part 21, including those we are adopting today...." *Id.* at 1238. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS licensee. 47 C.F.R. Sec. 21.13. Benson's failure to submit the necessary interference protection showing required by Section 21.901(d)(7) renders its application incomplete and unacceptable for filing in accordance with 47 C.F.R. Sec. 21.20(a). Therefore, Benson's applications were not in a "condition acceptable for filing" on the filing date, and was therefore unacceptable for filing.[6]

9. In his application, Benson stated he was familiar with the Commission's rules relevant to MMDS in item 33 of FCC Form 435 and the applicant's certification, item 36 of FCC Form 435. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC*, 294 F.2d 240, 242 (1961). Benson's showing demonstrates that he failed to understand the difference between, on the one hand, the previously-proposed and existing ITFS stations, and, on the other hand, MMDS proposals to be filed concurrently with the filing of Benson's application. Benson's failure to comprehend and comply with the filing standards all MMDS applicants are required to meet cannot be used to avoid the consequences of his failure.[7]

10. *Conclusion.* Having carefully considered all of the arguments and evidence submitted by Benson, we find that it was proper for the Division to return Benson's applications as unacceptable for filing, and reconsideration of that decision is not warranted. Accordingly, John R. Benson's request for reconsideration and reinstatement of the above-referenced applications IS DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

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[4] To mitigate the effects of the problem of "gridlock," the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs), or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock" problem where there are statistical areas, it can result in some cochannel stations being spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. Id. at 1264.

[5] "In those situations where [statistical areas]... are so close that a single transmitter could produce a signal strong enough to cause harmful interference in both [statistical areas], we require that each applicant... detail what steps it will take to prevent blocking cochannel use in the adjacent" statistical area. Id. at 1264.

[6] See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other than Maritime), 60 FCC 2d 549 (1976); see also Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713 (1987).

[7] We reject Benson's contention that he should be permitted to file curative amendments and have his applications reinstated, *nunc pro tunc*, for further processing. We believe that the Division's initial return of the Benson applications as unacceptable for filing was correct, and thus, *nunc pro tunc* reinstatement is not justified.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Reconsideration
of the National Association of
Business and Educational
Radio, Inc.

ORDER

Adopted: February 22, 1993; Released: March 23, 1993

By the Commission:

I. INTRODUCTION/BACKGROUND

1. On August 4, 1992, the National Association of Business and Educational Radio, Inc. (NABER) filed a Petition for Reconsideration of the Private Radio Bureau's July 6, 1992, action dismissing a Petition for Rule Making filed by NABER on March 6, 1992. In its Petition for Rule Making NABER proposed that Section 90.631(b) of the Commission's Rules, 47 C.F.R. § 90.631(b), be amended. Section 90.631(b) requires licensees of trunked 800/900 MHz systems to certify that they will place in operation 70 mobiles per channel five years from the date of license grant. For 800 MHz SMR licensees authorized prior to June 1, 1993, Section 90.631(b) provides that if this minimum loading requirement is not met, and if the system is located in an area where a waiting list for channels exists,[1] authorizations for any channel that is not loaded to 100 mobiles cancels automatically. NABER proposes that Section 90.631(b) be amended to reflect that, in the 800 MHz Specialized Mobile Radio (SMR) service, authorizations for channels that are not loaded to 100 mobiles will cancel only if the waiting list for that geographic area includes at least one licensee applying for channels to expand an existing SMR system.

2. By letter dated July 6, 1992, the Private Radio Bureau (the Bureau) dismissed NABER's petition because NABER failed to justify its conclusion that there will be a large, unwarranted surge in demand for SMR channels after we eliminate the current loading requirements on June 1, 1993,[2] (*See* PR Docket 86-404).[3] The Bureau found, in fact, that NABER's conclusion is contrary to the Commission's finding in PR Docket 86-404[4] that the SMR service has matured sufficiently to justify elimination of the channel recovery program, thereby allowing market forces to dictate the use of SMR channels.

II. PETITION FOR RECONSIDERATION

3. NABER argues that recent events justify its concern that our prospective elimination of channel recovery for failure to load will create "artificial" waiting lists for 800 MHz SMR channels. NABER states that Fleet Call Inc.'s (Fleet Call) recent petition for rule making, RM-7985, requesting the auction of unused 800 MHz spectrum and Dial Page's Request for waiver of the rules to create a wide-area SMR system have resulted in numerous speculative applications being filed which has created several "artificial" waiting lists. NABER contends that these developments confirm its belief that speculative applications will be filed in areas where the demand for service does not justify the number of applications and that the level of speculation is certain to increase absent a modified channel recovery program. Accordingly, NABER requests reconsideration of the Bureau's July 6, 1992, dismissal of the NABER petition and adoption of a Notice of Proposed Rule Making to amend Section 90.631(b) of the Commission's Rules as requested in its Petition for Rule Making.

III. DISCUSSION

4. The arguments presented by NABER are insufficient to justify reconsideration of the Bureau's dismissal of NABER's Petition for Rule Making. Although NABER has based its Petition for Reconsideration on circumstances that occurred after NABER filed its Petition for Rule Making, we find that these circumstances have not significantly altered our perception of the public interest.[5]

5. We are not persuaded by NABER's argument that favorable action on the Fleet Call and/or Dial Page proposal's would create "artificial" waiting lists.[6] The foundation of NABER's argument -- that "artificial" waiting lists will be created in areas where the actual demand for service does not justify the number of applications being filed -- is not supported. NABER's basic assumption, that a waiting list in an area is a direct indication of an immediate demand for service is, in fact, incorrect. Increased demand for additional licensing in a given area can be due to a variety of factors, including an existing demand for additional service, a perceived demand for additional service in the future, or a belief that current or future changes in the SMR industry will result in greater demand for channels. We concluded in PR Docket 86-404[7] that the

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[1] Applications for 800 MHz SMR category channels that cannot be granted due to a lack of available channels are placed on a waiting list for the geographic area. 47 C.F.R. § 90.611(b).

[2] *See* Section 90.631(b). NABER claimed that this sudden demand for SMR channels would create waiting lists in areas where, because of insufficient demand for spectrum, none had previously existed. NABER refers to such waiting lists as "artificial" waiting lists.

[3] Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838, 1845 (1988).

[4] *Id.*

[5] *See*, 47 C.F.R. § 1.429(b)(3).

[6] NABER's suggestion that we institute a rule making proceeding based on these proposals was premature when no decision had, at the time NABER's petition was filed, been made on the merits of either of these filings. Since NABER filed its petition the Private Radio Bureau adopted an Order dismissing Fleet Call's petition for rule making. Order, RM-7985, released December 16, 1992, DA 92-1677. Additionally, on December 2, 1992, Dial Page significantly modified its requests for waivers and its pending applications to withdraw its request that Dial Page be granted more than five channels at each proposed site. *See* 47 C.F.R. §§ 90.621(a)(1)(iv) and 90.627. Dial Page has left intact only those requests for waivers of Sections 90.631(e) and (f) of the Rules, 47 C.F.R. §§ 90.631(e) and (f), to permit an extended construction period.

[7] Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838, 1845 (1988).

SMR industry has sufficiently matured to permit market forces to play a larger role in determining the use of these channels.

6. NABER asserts that numerous applications have already been filed in response to the Fleet Call and Dial Page requests by "speculators" that do not intend to provide legitimate SMR service. It would be inappropriate, however, for the Commission to prejudge all new applicants as speculators merely because the existing systems within such applicant's geographic areas are lightly loaded.[8] It would be similarly inappropriate to prejudge such new applicants as speculators when the spectrum they desire is that of an industry that is highly competitive, constantly changing and growing, and entrepreneurial in nature. Our current construction and operation requirements, furthermore, provide the means for deterring speculators and for recovering any channels that are not used. In accordance with Sections 90.631(e) and (f) of our Rules,[9] channels of a trunked system will be recovered if the licensee fails to construct and place its system in operation within one year. Thus, *any* licensees that fail to properly construct and place their systems in operation will be forced to relinquish their channels.

IV. CONCLUSION

7. For the foregoing reasons, we find that the rule making requested by NABER is not warranted due to the speculative nature of its petition's arguments and because we remain persuaded that our existing rules are sufficient to deter speculation. Having carefully considered all of the arguments and information presented, we find that action is not warranted.

V. ORDERING CLAUSES

8. In accordance with Section 1.429(b), 47 C.F.R. § 1.429(b), IT IS ORDERED that the Petition for Reconsideration filed by the National Association of Business and Educational Radio, Inc. IS DENIED. This order is issued pursuant to the authority of Section 4(i), 303(r), and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(a)(2) and is effective on its release date. *See* 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

9. For further information concerning this *Order*, contact Steve Sharkey, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[8] While NABER argues that an influx of new licensees into a market will harm existing licensees that presumably serve the market with lightly loaded systems, it is equally plausible that the new licensees have ascertained a demand for service that remains unsatisfied in markets where there is little or no competition for available customers.

[9] *See* 47 C.F.R. §§ 90.631(e) and (f).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-12

In re Applications of

JOHN D. BOMBERGER File No. BPH-891026MC

COMMONWEALTH AUDIO VISUAL ENTERPRISES, INC. File No. BPH-891026MT

For a Construction Permit for a
New FM Station on Channel 277A
in New Market, Virginia

ORDER

Adopted: March 11, 1993; Released: March 23, 1993

By the Commission:

1. Before the Commission for consideration are a Decision, *John D. Bomberger*, 7 FCC Rcd 5516 (Rev. Bd. 1992); an Application for Review filed September 28, 1992 by John D. Bomberger and an Opposition filed October 13, 1992 by Commonwealth Audio Visual Enterprises, Inc. We agree with the Board's resolution of this case.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed September 28, 1992 by John D. Bomberger IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1993

PACIFIC BELL FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On March 10, 1993, Pacific Bell filed proposed revisions to its cost allocation manual (CAM) for the separation of regulated and nonregulated costs. These revisions incorporate changes previously approved by the Common Carrier Bureau in an Order released on September 4, 1991, related to the transfer of certain enhanced services from Pacific Bell to a newly formed, wholly owned affiliate, Pacific Bell Information Services (PBIS). Pacific delayed implementing the revisions pending approval of the California Public Utilities Commission (California). Approval was granted by California on July 22, 1992, and PBIS was formed effective January 1, 1993.

Pacific now seeks to incorporate the necessary changes to its CAM. In addition to the CAM revisions previously approved by the Bureau, but never implemented, Pacific's proposal includes changes required by the California approval; and changes to cost allocation factors resulting from the spinoff of PBIS as a separate entity.

Parties may file comments on the proposed revisions to Pacific's CAM no later than April 20, 1993. Replies should be filed by May 5, 1993. Comments should reference file number AAD 93-24. A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L Street, N.W., Washington, D.C. 20554 and to International Transcription Services, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202)857-3800. Copies are available for public inspection and copying at the Accounting and Audits Division public reference room (Room 812), 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS, Inc.

For further information, contact Ed Dashkin at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GROUP LONG DISTANCE, USA,
Complainant,

v. File No. E-93-023

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: March 18, 1993; Released: March 24, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 14, 1992, Group Long Distance, USA (GLD) filed a formal complaint against American Telephone and Telegraph Company (AT&T). On January 29, 1993, AT&T filed its answer. On March 15, 1993, GLD gave notice that it was withdrawing its complaint without prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-204

In re Applications of

CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT	File No. BRED-900131UA
For Renewal of License of Station KUCB-FM Des Moines, Iowa	
and	
IOWA ACORN BROADCASTING CORPORATION	File No. BPED-900102MB
For a Construction Permit for a New FM Station, Des Moines, Iowa	
MINORITY COMMUNICATIONS, INC.	File No. BPED-900116MA
For a Construction Permit for a New FM Station, Des Moines, Iowa	

Appearances

Alfredo Parrish, Esq., Elizabeth Kruidenier, Esq., and *T. Rae Hammans, Esq.* for Center for Study and Application of Black Economic Development; *Steve Bachmann, Esq.*, for Iowa Acorn Broadcasting Corporation; *Mark E. Fields, Esq.*, for Minority Communications, Inc.; *Charles E. Dziedzic, Esq., Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.* for the Chief, Mass Media Bureau

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: March 17, 1993; Released: March 26, 1993

PRELIMINARY STATEMENT

1. This proceeding was commenced on July 30, 1991, by Commission *Hearing Designation Order* FCC 91-197, published at 56 Fed. Reg. 37213 (August 5, 1991), and reported at 6 F.C.C. Rcd 4622 (Comm'n 1991) (*"HDO"*), setting down for hearing the application of Center For Study And Application Of Black Economic Development ("Center") for renewal of its license of Station KUCB-FM ("KUCB") at Des Moines, Iowa and the mutually exclusive applications of Iowa Acorn Broadcasting Corporation ("Acorn") and of Minority Communications, Inc. ("Minority").

2. The Commission designated the following basic qualifying issues:

(a) To determine whether Center has been inept in operation of Station KUCB - FM since 1979;

(b) To determine whether Center violated Section 73.561 of the Commission's rules;

(c) To determine whether Center misrepresented material facts to, and/or concealed material facts from, the Commission in connection with its answer to Question 6 of the instant license renewal application;

(d) To determine the current ownership and composition of Center and the ownership and composition during the license term, including the role and participation of Charles Knox, and the effect thereof on Center's basic qualifications to be a Commission licensee;

(e) To determine whether control of Center was transferred without Commission approval, or exercised by persons not authorized to do so in violation of Section 310 (d) of the Communications Act of 1934, as amended;

(f) To determine whether Center made any misrepresentations to the Commission or lacked candor with the Commission as to the true officers and directors of the permittee and licensee, and whether Center violated Section 73.3615 of the Commission's Rules;

(g) To determine, in light of the evidence adduced pursuant to issues (a) through (f), *supra*, whether Center is basically qualified to be a Commission licensee.

The Commission assigned to Center both the burden of proceeding and the burden of proof on each of the basic qualifying issues (a) through (g).

3. Since there are two new applicants competing for an educational frequency, the Presiding Judge granted a Bureau motion to amend the case caption and also included the following comparative issues:[1]

(a) To determine (i) whether a share - time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so, the terms and conditions thereof; (ii) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective appli-

[1] *See Memorandum Opinion and Order*, FCC 91M-2647, released August 28, 1991. Each of the three applications propose noncommercial educational operations. Therefore, the comparative issues are educational. *See New York University*, 10 Radio Reg. 2d (P&F) 215 (Comm'n 1967).

> cants; and (iii) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> (b) To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

Each of the applicants has the burden of proof with respect to the respective proposals. *See Julia S. Zozaya*, 5 F.C.C. Rcd 6607 (Comm'n 1990) (an applicant has the evidentiary burden on a proposal).

4. The Presiding Judge added a financial qualifying issue against Acorn based on a substantial question of fact that was raised by the Bureau. *See Order* FCC 91M-3004, released October 3, 1991. The issue was set as follows:

> To determine whether Iowa Acorn Broadcasting Corporation has reasonable assurance of funds to construct and operate Channel 207C; whether Iowa Acorn is financially qualified; and whether Iowa Acorn is qualified to receive a Commission permit for the Des Moines community.

Id.[2] The burden of proceeding and the burden of proof were assigned to Acorn. *Id.*

5. On February 25, 1992, an evidentiary admissions session was conducted upon notice to all the parties and their counsel. Center failed to appear and participate. Center was declared by the Presiding Judge to be in default and, as a result, Center was precluded from presenting a direct case. *Memorandum Opinion and Order*, FCC 92M-264, released February 28, 1992. However, it was ruled that Center would be permitted to present rebuttal evidence. *Id.* A motion for reconsideration was considered and denied. *Memorandum Opinion and Order*, FCC 92M-282, released March 6, 1992.

6. On March 3, 1992, Center filed a Motion For Disqualification Of Presiding Officer which was denied by the Presiding Judge. *Memorandum Opinion and Order*, FCC 92M-288, issued March 4, 1992. Center filed an appeal on March 5, 1992, and, in accordance with Commission procedures, the Presiding Judge certified the question to the Review Board and stayed further litigation of the case pending action by the Review Board on the certified question. *Order*, FCC 92M-298, released March 9, 1992. The hearing that had been set to commence on March 10, 1992, was cancelled. *Id.* The Review Board affirmed the ruling of the Presiding Judge on his qualification to hear the case. *See Review Board Memorandum Opinion and Order*, FCC 92R-39, adopted May 8, 1992, and reported at 7 F.C.C. Rcd 3101 (Review Bd 1992).

7. The Presiding Judge lifted the stay on May 14, 1992, and ordered the parties to appear for a conference that was to be held on June 3, 1992. *Order*, FCC 92M-567, released May 15, 1992. The parties were to submit to the Presiding Judge, in advance of the conference, those dates in 1992 on which there were no prior court or professional conflicts. *Id.* At the request of Minority for a continuance which was based on a court conflict, and with the concurrence of all other parties, the prehearing conference was reset for and was held on June 17, 1992. *Order*, FCC 92M-574, released May 19, 1992. For purposes of setting a firm hearing date, the parties submitted calendars which reflected a universal opening for August 10, 1992. The Presiding Judge forthwith set that date for the commencement of hearings over Center's subsequent objection. *Order*, FCC 92M-692, released June 19, 1992.[3]

8. A formalized ruling memorialized the bench ruling that had set the hearing for August 10, 1992, and also set forth detailed reasons for denying Center's request for hearing dates in early 1993. *See Memorandum Opinion and Order*, FCC 92M-696, released June 2, 1992. Thereafter, on June 30, 1992, Center filed a written Application For Continuance Of Hearing Date which was denied in the Presiding Judge's *Memorandum Opinion and Order*, FCC 92M-779, released July 15, 1992. There was also a denial of Center's subsequent Application For Recess Of Hearing. *Memorandum Opinion and Order*, FCC 92M-822, released July 30, 1992. Center again challenged the Presiding Judge for bias and the motion was again denied at the trial level and at the appellate level. *Memorandum Opinion and Order*, FCC 92M-823, released July 30, 1992, *aff'd*, *Memorandum Opinion and Order*, FCC 92R-68, adopted August 5, 1992, reported at 7 F.C.C. Rcd 5192 (Review Bd 1992).

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[2] The financial qualification issue was added after it was disclosed that Acorn had declined to certify affirmatively to its financial qualifications in its application. *Id.* (*See* Prehearing Conference, October 1, 1991, at Tr. 63-74.)

[3] After the Presiding Judge had announced the August 10 hearing date from the bench, counsel for Center asserted that he had a trial conflict that arose after he had submitted his agenda and that he had made vacation plans. Center suggested that hearing dates be set by the trial judge in early 1993 in order to accommodate counsel. There was no assertion that more time was needed by counsel to prepare for trial. *Id.* at fn.2. and Tr. 315, 396-401.

Also, it is noted that there were a series of interlocutory rulings made in response to motions that were filed by Center after the stay was lifted. *See Memorandum Opinion and Order*, FCC 92M-602, released May 26, 1992 (denying Center's motion for leave to proceed *in forma pauperis*); *Memorandum Opinion and Order*, FCC 92M-603, released May 27, 1992 (Chief Judge denied motion for change of venue to Des Moines); *Memorandum Opinion and Order*, FCC 92M-608, released May 27, 1992 (renewing denial of Center's right to cross-examine based on its waiver for failure to appear at admissions session); *Memorandum Opinion and Order*, FCC 92M-613, released May 28, 1992 (denying Center's motion to offer the testimony of Charles Knox *via* speakerphone); *Memorandum Opinion and Order*, FCC 92M-639, released June 3, 1992 (denying Center's motion for continuance because mooted by stay pending appeal and rulings against suggestions by Acorn for the addition of further issues against Center); *Memorandum Opinion and Order*, FCC 92M-643, released June 3, 1992 (denial of Center's motion to enlarge issues based on alleged perceived adverse procedural rulings of Presiding Judge inferring racial bias); *Order*, FCC 92M-660, released June 11, 1992 (denying as moot a request by Center to participate in conference by telephone which was previously authorized) clarified by *Order*, FCC 92M-661, released June 11, 1992 (further clarification that Center was authorized to participate in the June 17, 1992 prehearing conference *via* speakerphone).

9. Hearings were held on August 10, 11, 12 and 13, 1992. The record was closed on the last day of hearing. (Tr. 1479.) In accordance with the schedule set by the Presiding Judge, the parties filed Proposed Findings Of Fact and Conclusions Of Law ("PFC") on October 16, 1992, and filed their Reply PFCs on November 6, 1992. *See Order*, FCC 92M-883, released August 18, 1992.

FINDINGS OF FACT

10. A consolidated factual hearing was conducted on all issues wherein the parties presented evidence and were afforded the opportunity to conduct cross-examination. *Ashbacker Radio Corp.* v. *F.C.C.*, 325 U.S. 327, 333 (1945); *Administrative Procedure Act*, 5 U.S.C.A. §556(d) (parties to comparative broadcast hearings have right to present oral and documentary evidence and to conduct cross-examination). The relevant period for assessing any renewal expectancy was from September 30, 1982 through January 2, 1990. *See* Joint Report On Renewal Period executed by the parties and filed on November 22, 1991.

11. The standard noncommercial comparative issue would apply here (assuming no time-share arrangement) which is an inquiry to determine (a) which applicant will best integrate the operation of the proposed station into the overall educational and cultural objective of the applicant, *New York University*, 10 Radio Reg. 2d (P&F) 215 (Comm'n 1967); (b) the manner in which the proposed operation of the competing applicants will meet the needs of the community to be served, *Pacifica Foundation*, 21 F.C.C. 2d 216 (Review Bd 1970); and (c) whether "other factors" in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service, *New York University, supra*.[4] The Presiding Judge must also determine, *sua sponte*, whether the preponderance of the evidence supports the imposition of a time-share arrangement. However, because the preponderance of the evidence shows that only one party applicant is basically qualified to receive a grant, there will be no comparative analysis made of the programming proposals.[5]

Description Of The Parties

Center For Study And Application Of Black Economic Development

12. Center is incorporated as a nonprofit corporation under the laws of Iowa. Since 1978, it operated noncommercial radio Station KUCB(FM), a Class C3 station that is authorized to operate at Des Moines, Iowa with an effective radiated power of 9.72 kilowatts. Ultimate control of Center is in its members who are persons who subscribe to the purposes of community humanization and to the improvement of conditions of the community's Afro-American minority population. (Center Exh. 7 at 1-4.) Center's renewal application was filed on January 30, 1990. (Bureau Exh. 12 at 1.) The application bears the signature of Jamal Long, Vice-President, but the transcript of testimony reflects that Charles Knox signed Mr. Long's signature. (Knox, Tr. 1415.)

13. Ownership Reports that were filed on Center's behalf between 1979 and 1990 reflect different governing boards. On May 30, 1979, Center's original board consisted of:

Linda Hardnett
Mary Lincoln
Barbara Simmons
Venessa Shade
John Henderson
Albert L. Bibbens
Marlene Shade
Margaret Shade
Vernita Moss
Harris Caesar
Jamal Long
Edward Turner
Harry Flipping

(MMB Exh. 1, pp. 84-86). There were four subsequent ownership reports filed in 1987, 1988, 1990 and 1992. Dr. Charles Knox was reported to be Center's president in 1987, 1988 and 1990. (MMB Exh. 12, pp. 4-5). Center's current governing body as reported in January 1992, was disclosed as follows:

Wayne Ford
Crystal Peavey
Ako Abdul-Samad
Jamal Long
Patricia Fuller
Tommy Briscoe
Mary Lincoln
Hadaasha Maryum
Bernee Long
William Tyson
Harry Caesar

(Center Exh. 1, p. 1; MMB Exh. 12.)

14. The majority of Center's members and all of its officers and directors are Afro-American. There is no evidence of an auxiliary service.

Iowa Acorn Broadcasting Corporation

15. Acorn is a nonprofit stock-based corporation, all of whose stock is owned by Acorn National Broadcasting Network, Inc. ("ANBN") which is located in New Orleans, LA. Acorn and its parent are corporations that were formed to advance the needs of persons of low to moderate incomes. A majority of Acorn's board of directors are persons who are residents of the Des Moines area having low to moderate incomes. (Acorn Exh. 1 at 1.) But none of ANBN's officers or directors reside in Des Moines or in Acorn's service area. (Green, Tr. 469.) The targeted audience of low to moderate income households in Des Moines is estimated (based on extrapolations of Acorn's data) to consist of approximately 45,250 households which constitute about 60% of the city's total households. (Acorn Exh. 1 at 2.) The estimated "low to moderate" annual income on a per household basis is approximately $20,900. (Acorn Exh. 1 at 2-3.) Acorn plans to present that audience with programming related to housing, job opportunities, neighborhood redevelopment and related "red-lining," and issues pertaining to the aging minority groups, education, crime prevention, women, and social services. (Acorn Exh. 1 at 4-6.)

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[4] *See Real Life Educational Foundation of Baton Rouge, Inc.*, 4 F.C.C. Rcd 8433 (Admin. L.J. 1989), 5 F.C.C. Rcd 3420, (Review Bd 1990), 6 F.C.C. Rcd 259 (Comm'n 1991) (diversification is not a comparative criteria in educational broadcast cases). But comparative signal coverage can be weighed as an "other factor" under a contingent comparative analysis. *See also Seattle Public Schools*, 3 F.C.C. Rcd 3028, 3045 (Review Bd 1989).

[5] But *see* p. 15 and fn.24, and p. 24 and fn.39 *infra*, showing that Minority is favored over Acorn under "others factors" comparative criteria.

16. Acorn represents that a majority of its members are minorities. (Acorn Exh. 1.)[6] Acorn proposes to install auxiliary power. (Acorn Exh. 4.)

Minority Communications, Inc.

17. Minority is a nonstock, nonprofit Iowa corporation. (Minority Exh. 1 at 1.) There are five directors each of whom is a resident of Des Moines. These persons are:

Larry D. Nevilles, President
Alex Crawford, Jr., Vice President
Dewayne Long, Treasurer
Rocky Weston
Grace Roane

(*Id.*) Minority was organized for purposes of community improvement and education. (Minority exh. 2.) Minority proposes to present programming that will address housing, employment, medical services, crisis intervention, current events, educational opportunities, financial management, business opportunities, job skills and personal development. (*Id.*)

18. Each of Minority's officers and directors is an Afro-American. (Minority Exh. 1.) Minority proposes to install auxiliary power.[7] (Minority Exh. 9.)

Comparative Coverage

19. The applicants would provide primary service to relevant areas and populations as follows:

Total Populations And Areas

	Population	Area (Sq. Km)
Center	334,085	1,262
Acorn	214,608	256
Minority	318,398	1,167

(Joint Exh. 2 at Table V)

During the daytime, all of the proposed service areas receive a minimum of four existing services from educational stations. (*Id.* at 2.)

Nighttime Educational Services

20. At nighttime, the different areas receive as few as two existing educational radio services. Each applicant would provide a third or fourth educational radio service at night in the following areas and to the following populations:

	Third Service		Fourth Service	
	Population	Area (sq. km)	Population	Area (sq. km)
Center	315,630	1,173	18,455	89
Acorn	214,608	256	0	0
Minority	313,481	1,147	4,917	18

(*Id.* at Table VII.)

Share-Time Arrangement

21. There is no reasonable probability that the parties would be able to reach an accord on a share-time arrangement. Minority's President, Larry D. Nevilles, had formerly been an assistant manager at Center. (Center PFC at 20.) Center had reprimanded Mr. Nevilles while he was in Center's employ. (Center PFC at 20-21.) Therefore, there is no reasonable likelihood that Center and Minority would agree to share time on the frequency.

22. Acorn has joined with Minority in seeking an added issue to determine whether Center's broadcast announcers were threatening bodily harm and Acorn also sought issues on whether Center has the requisite fitness of character to own and operate a station. It was determined that there were not substantial issues raised based on the assertions. *Memorandum Opinion and Order*, FCC 91M-3320, released November 22, 1991. Based on such charges which were seen to be continuing throughout the hearing, there would be no perceived benefit in requiring the parties to consider a share-time agreement. Also, since Center has been ordered to defend its character in a renewal proceeding, the challengers have no incentive to consider a share-time arrangement with Center until Center's qualification to hold the license are determined. Similarly, since Acorn's financial qualifications are in issue, Minority would have no incentive to negotiate a pre-decisional time-sharing arrangement between the two. Nor has there been any evidence offered by the parties on time-sharing. For these reasons there will be no further findings or discussion on the time-share issue.[8]

Center's Qualifications

The Ineptness Issue

23. Center has the burden of proving that it was not inept in its operation of Station KUCB-FM since 1979. *HDO* at Para. 16(a).

24. Through the Bureau's request for admissions and Center's answers, the hearing record reflects that at an inspection of KUCB-FM on March 24, 1983, the following violations were found:

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[6] Ms. Green is an Afro-American. But there is no listing in Acorn's exhibits of other Acorn officers and directors who are alleged to be local residents. Therefore, it cannot be determined from the record which officers and directors are minorities, except for Ms. Green.

[7] Minority's evidence that was proffered to show that Minority will offer subcarrier frequencies for broadcasting to the blind and the handicapped was rejected because there was no special issue added for which such evidence would be relevant. (Minority Exh. 9.) *George E. Cameron, Jr.*, 71 F.C.C. 2d 460, 465 (Comm'n 1979) (in order for a party to be permitted to present evidence on a specialized programming format, it is necessary for that party to demonstrate that the specialized format is not available in the market).

[8] The Review Board has noted that there is no point in ordering a share-time arrangement that "might be still-born for lack of an amenable co-partner." *Maricopa County Community College District*, 6 F.C.C. Rcd 953 (Review Bd 1991). That describes precisely the situation in this case.

(a) KUCB's construction permit had expired and Center had failed to apply for a license;

(b) Audio equipment performance measurements required by §73.1590 of the Commission's rules were not available;

(c) No remote or extension meters were installed to permit the transmitter operator to observe and monitor operations under §73.1860(b) of the Commission's rules;

(d) There was no Emergency Broadcast System receiver and signal generator as required by §73.932;

(e) The operator's license of the person acting as the Station's Chief Operator had expired and the operator on duty had no license or permit.

(*See* ltr. dtd. April 6, 1983, from James A. Dailey, FCC Engineer-In-Charge, to Charles Knox, MMB Exh. 1 at 12.)[9] Center has admitted to these violations. (MMB Exh. 1 at 96.)

25. On November 23, 1984, the Commission requested Center by telegram to explain discrepancies between its construction permit and its license application. (MMB Exh. 1 at 16-17.) On April 27, 1986, the Commission requested Center by telegram to provide correct antenna power gain, transmission line efficiency, and transmitter power output. (MMB Exh. 1 at 19.) A second telegram was sent to Center on September 25, 1986. (MMB Exh. 1 at 20.) On December 17, 1987, the Commission advised Center that the transmitter power output in KUCB's 1984 license application remained uncorrected. (MMB Exh. 1 at 42.) A second telegram was sent to Center on March 8, 1988. (MMB Exh. 1 at 43.) Center failed to respond to those telegrams.

26. On January 7, 1986, the Commission discovered that KUCB had failed to operate on its authorized frequency, failed to maintain a public inspection file, and failed to post the station's construction permit or operator's license. Also, violations that were found in 1983 were uncorrected, i.e., the failure to install an Emergency Broadcast System receiver or tone generator, a failure to provide remote control capability, and a failure to have a licensed operator on duty. (MMB Exh. 1 at 34-35, 57-59.)

27. On April 11, 1986, the Commission discovered that there was a failure to control or monitor KUCB's transmitter from a remote control point, a failure to properly time the Emergency Broadcast System monitor, and a failure to make station records available for inspection. Also, KUCB was found to be operating with a power output that was measured to be 45% of its authorized power and with a total modulation of 120% in violation of §§73.1560(b) and 73.1570(b) of the Commission's rules. (MMB Exh. 1 at 35, 60-61.) Center has admitted that the violations observed on January 7, 1986, and on April 11, 1986, had in fact occurred. (MMB Exh. 1 at 98, 101.)

28. On October 8, 1986, the Commission found that there were continuing violations with respect to Center's failures to control or to monitor KUCB's transmitter from a remote control point; to make available the station's records for inspection; to maintain an Emergency Broadcast System receiver and a tone generator; to maintain a public inspection file; to post KUCB's construction permit; to designate an authorized chief engineer; and to broadcast promotional announcements without authorization. (MMB Exh. 1 at 35-36.) Center has admitted that these violations existed on October 8, 1986. (MMB Exh. 1 at 98.)

29. On March 27, 1987, a detailed six page letter was sent to Center by Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau. (MMB Exh. 1 at 34-39.) Center failed to respond by May 18, 1987. The Bureau sent a second letter requesting a response to the March 27th letter within five business days. (MMB Exh. 1 at 40-41.) Center did respond by letter from Mr. Samad, Center's Vice President, on July 31, 1987. (MMB Exh. 1 at 23-33.)

30. Center's letter of July 31, 1987, stated that Center understood the seriousness of responding to the Commission's request for information, stated that internal disturbances at the station caused the delay in reply, and affirmed Center's intent to comply with the Commission's regulations. (MMB Exh. 1 at 23.) Attached to the letter was an eleven point response to the Chief's letter of March 27, 1987, which reply addressed the Commission's concerns regarding remote control and Emergency Broadcast System equipment. It also represented having an adequate public inspection file. The station's construction permit and license application were represented as being posted. Also, designation was shown of the station's Chief Operator who was identified as Jerry L. Bowers. (MMB Exh. 1 at 24.) Supporting documents were included with Center's letter. (MMB Exh. 1 at 25-33.)

31. On January 28, 1991, the Commission found continuing violations of rules requiring that a licensed operator be on duty, requiring a remote control capability for observing and monitoring transmitter operations, and requiring the posting of the station's authorization. This inspection also disclosed that KUCB had violated Commission rules in failing to include in its public inspection file a list of programs showing the treatment of community issues and that Center had not posted a chief operator contact, had not made available any Emergency Broadcasting Systems checklist, and had not prepared logs documenting EBS tests. (MMB Exh. 1 at 82-83.) Center has admitted that the violations observed on January 28, 1991, had occurred. (MMB Exh. 1 at 101.)

32. The Bureau also relies on evidence that Center was late in filing its renewal application on January 22, 1990, and that it failed to file the requisite number of copies. (MMB Exhs. 12-13.) It is noted as a significant finding that KUCB was inspected on March 18, 1991, and no violations were found. (MMB Exh. 22.)[10]

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[9] MMB Exh. 1 is the Mass Media Bureau's First Request For Admissions filed on September 9, 1991, and the Response of Center dated September 16, 1991. These documents were received in evidence at the admissions session. (Tr. 165, 167.) *See Oliver Kelly, et al.*, 7 F.C.C. Rcd 4239 (Comm'n 1992) (answers to interrogatories must be offered and received in evidence in order to qualify for consideration in findings).

[10] The Bureau also asks for findings based on testimony that Center knew it was late in filing its renewal application when it learned that a challenge had been filed. (Samad, Tr. 1121.) But there is no nexus shown between the receipt of information about a challenge and a late-filing. Center was late in filing its renewal and that is established as a fact.

The Silence Issue

33. Between 1984 and 1987, KUCB-FM left the air and ceased broadcasting for four periods of less than one week. (Nevilles, Tr. 727-28; Long, Tr. 1037-40.) KUCB-FM also went off-the-air for approximately two years during the period 1987-1989. (Green, Tr. 487.) At times, it was reported that the station signal was shut down because it was bleeding into another frequency. (Nevilles, Tr. 728, Long, Tr. 972.)

34. These periods of silence were caused by problems experienced with KUCB's transmitter. There is no evidence that Center had intended not to broadcast or lost interest in operating the station. Also, the fact that Center was nonprofit is noted as evidence that there was no commercial motive for ceasing to operate. *Cf. Brown Communications,* 7 F.C.C. Rcd 7221 (Admin. L.J. 1992) (licensee found to have chosen to leave the air to concentrate on a perceived greater monetary opportunity). The sole reasons for the periods of silence were equipment failures.

35. Center is not a well-capitalized venture. At one time, KUCB housed its transmitter in a trailer which had a hole in the roof in order to accommodate a cable. Rain water came in contact with the cable and caused outages. (Long, Tr. 931, 978-80, 989, 1037-38, 1076; Samad, Tr. 1164.) The station went off-the-air in early 1987 because of the cable's malfunction. (Knox, Tr. 1387, 1390.) In late 1987, there were suspected acts of sabotage. (Long, 923; Samad, 1085.) In the Fall of 1987, KUCB went silent for approximately two years. (Green, Tr. 487; Nevilles, Tr. 668, 727; Long, Tr. 1039; Samad, Tr. 1168-69.) *See also* Exh. 1 at 49 (local resident confirms on January 13, 1989 that KUCB had been off-the-air since 1987).

36. Sometime in 1988, the trailer was removed, allegedly without authorization, and a dispute arose as to its ownership. The trailer was held by Center under a lease and, without Center's knowledge, it was sold by the owner. (Long, Tr. 943-50.) During the course of several months of legal action, KUCB had no transmitter and remained silent. KUCB filed for a writ of replevin on July 13, 1989. (Center Exh. 111.) The case was settled on September 1, 1989, and in December 1989, KUCB resumed broadcasting. (Samad, Tr. 1116, 1119.)

37. Mr. Long, who was Center's manager during the period, testified that whenever KUCB went off-the-air the Commission was notified:

> Q. During that time, Mr. Long, did you notify FCC of these problems?
>
> A. As I said earlier, we were constantly in contact with - - - in communication with FCC when interruptions like this would happen with the transmitter and with the water and stuff.

(Long, Tr. 932.) Mr. Long could not testify that he had specifically requested authorization to remain off-the-air for a two year period but he believed someone else "probably" sought the authorization. (Long, Tr. 104-42.) Most of the contacts with the Commission that were initiated by Center were by telephone but those calls were not memorialized in a contemporaneous writing.

38. Documentary evidence relating to Center's written communications with the Commission were reviewed by the Presiding Judge. There was no evidence found of a written request to remain off-the-air for a period of two years. On July 31, 1987, Mr. Samad had assumed duties as station manager and he made a lengthy reply to the Bureau's Branch-Enforcement Division letter of May 18, 1987. Mr. Samad did represent to the Commission that all violations had been corrected.[11] But there is no reference in the document to being off-the-air or requesting authorization to go silent. (MMB Exh. 1 at 23-33.)

39. By Commission telegram dated December 17, 1987, Dennis Williams, Branch Chief, and Dale Bickel, Supervising Engineer, sent a telegram to Center which advised:

> [Center's July 31, 1987] amendment corrects antenna gain and transmission line efficiency as requested. Transmitter power output (TPO) still in error. From values given TPO is calculated by FM staff to be eleven decimal zero kilowatts while applicant specifies nine decimal six kilowatts. Must amend to specify correct TPO and transmitter operating constants. Submit reply in writing within fifteen days of the date of this telegram. Include copy of this telegram with response. License application held in abeyance pending response.

(MMB Exh. 1 at 42.) By a Commission telegram dated March 8, 1988, it appears that Center did not respond to the above telegram or correct the deficiencies cited therein. (MMB Exh. 1 at 43.) By letter dated March 19, 1988, Center's Acting Executive Director and Board Member, Mr. Jamal Long, advised the Commission:

> We are continuing to deal with the bleeding of our signal. We will be off the air for the next 60 days. As our engineer attempts to correct the problems, we will keep you [informed] of our status.

(MMB Exh. 1 at 44, 98-99.) Thereafter, Mr. Long sent the Commission a letter dated October 29, 1988, which stated:

> We are continuing to deal with the bleeding of our signal. We will be off the air for the next 120 days. As our engineer attempts to correct the problem, we will keep you inform (sic) of our status.

(MMB Exh. 1 at 45, 99).

40. On November 23, 1988, the Commission sent a letter to Center (to the attention of Mr. Long) which reflects six unsuccessful attempts to contact Mr. Long by telephone in order to follow up on Center's request to remain silent for 120 days. The Commission specifically advised Center and Mr. Long:

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[11] There is a reference in Mr. Samad's letter to the fact that the station's transmitter was "destroyed in a recent storm" and informing the Commission that Center was in the process of purchasing a transmitter. Mr. Samad assured the Commission that the station would "update" its status at a later time. (MMB Exh. 1 at 29.) But no request was made to stay-off-the air and the Commission was not informed that KUCB would be silent.

> It is necessary for you to submit a detailed description of the problems you are experiencing with your transmission system. Specifically, an explanation of how the "bleeding" of your signal is occurring and why 120 days is needed to correct this problem. Further action on the STA will be withheld for a period of fifteen (15) days from the date of this letter to give you an opportunity to respond.

(MMB Exh. 1 at 47, 48.) Center responded through Mr. Long's letter of January 4, 1989:

> The problems that you outlined in your letter are cleared up. The bleeding problem has been corrected. The transmitter adjustments have been made.

(MMB Exh. 1 at 46, 99.) Center acknowledged through testimony at the hearing that a station must be on-the-air in order to have a "bleeding" problem.

41. By letter dated July 11, 1990, the Commission advised Center that in response to Center's attorney's letter dated May 30, 1990, a special temporary authority (STA) was granted to KUCB in order to permit KUCB to operate over proposed new facilities. (MMB Exh. 1 at 77.) But there was no authorization to go off-the-air.

Mitigation On The Inept And Silence Issues

42. Center offers evidence on facts and circumstances which will be considered in mitigation:

> Concerning the issue of ineptness, one must consider the multitude of events occurring over which Center had absolutely no control.

See Center's PFC at 16.

43. Mr. Nevilles was a former assistant manager at Center. He testified that "one reason" that KUCB left the air was a lack of funds to keep an engineer on staff. (Nevilles, Tr. 733.) Mr. Long, a manager who has been associated with KUCB since 1973 in various capacities, testified to difficulties in locating a suitable building that had adequate roofing, air conditioning and heating. (Long, Tr. 900, 909-10.) The initial building location was condemned and Center was evicted. (Long, Tr. 931.) Even after a move, continued trouble was experienced with the transmitter which was housed in a trailer. (Long, Tr. 931.) The trailer was inadequate for keeping out bad weather elements which caused malfunctions. Other problems were experienced with stolen turntables and stolen checks. (Long, Tr. 923.) None of these problems, however, relate to a request to remain off-the-air for a lengthy period of time, i.e., one to two years. And none of these facts were submitted to the Commission in an application for authorization for an extended period of silence.[12]

44. Mr. Samad has been associated with KUCB since its inception. He served as general manager and he is on the board of directors. Mr. Samad substantially confirmed the difficulties experienced by Center with its transmitter. (Samad, Tr. 1065.) According to Mr. Samad, transmitter power was on one occasion curtailed by lightning and there were technical problems experienced pertaining to tower height and location. (Samad, Tr. 1076.) Mr. Samad testified that the transmitter was old and that it was difficult to locate replacement parts. (Samad, Tr. 1072.) Local fundraisers were utilized in an attempt to obtain sufficient funds to purchase a new transmitter. (Samad, Tr. 1076.) Mr. Samad further testified that he made several attempts to alert the FCC to these problems by telephone. In reaching a staff person in either Kansas City or Washington, D.C., Mr. Samad was advised to consult an engineer. (Samad, Tr. 1074.) A non-paid volunteer engineer attempted to rewire equipment on a number of occasions. (Samad, Tr. 1077.) Apparently, those efforts were not successful. Mr. Samad testified that a blown tube caused the station to remain silent longer than anticipated because there were no readily available funds for a replacement at a cost of $800. (Samad, Tr. 1083.)

45. There were other mitigating factors which were the subject of Mr. Samad's testimony.[13] He testified that when the station went off-the-air the electric bill became delinquent. It was not possible to raise money from volunteers when the station was silent. (Samad, Tr. 1107.) Mr. Samad repeated the testimonial assertion that he had placed two telephone calls to the Commission advising that the station was silent and that there were a number of times that Mr. Samad had asked for assistance. (Samad, Tr. 1100, 1142-43.) At that time the intention was to return to the air shortly which is the reason why Mr. Samad states that he called rather than wrote to the Commission. (Samad, Tr. 106.) The station's inability to return to the air at that time was a result of faulty station equipment, a damaged transmitter, and an accrued electrical bill of approximately $2,500. (Samad, Tr. 1107.) Similar testimony was received from the station's current manager, Mr. Kalonji Saadiq. (Saadiq, Tr. 1257, 1260.)

46. Dr. Charles Knox testified to his work with community controlled radio stations and his conception of the idea for an Afro-American owned community radio station for Des Moines in 1979. (Knox, Tr. 1345.) Dr. Knox testified that he was the promoter and the organizer of

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[12] Center relies in its proposed findings on certain testimony of Mr. Long that he had stayed in contact with the FCC concerning these problems. (*See* Center's PFC at 18 and Long, Tr. 932.) Center may have made serendipitous disclosures by passing hints in phone calls and by making references in letters to problems that it was experiencing. However, these disclosures were not justification for an admitted unauthorized silence for a period of about two years.

[13] One line of testimony which will not be weighed and considered by the Presiding Judge are the accounts of alleged misconduct on the part of Mr. Nevilles while he was working at KUCB-FM. (Samad, Tr. 1090-93.) Counsel for Center was warned by the Presiding Judge to avoid a line of direct examination of Mr. Samad which related to any personality clashes with Mr. Nevilles who was now a challenging applicant. (*See* Tr. 1088-90: counsel instructed to avoid confrontational testimony which is not necessary to case issues). The grounds for the limitations placed on Center were stated to be FRE 403 (exclusion of relevant evidence on grounds of prejudice, confusion or waste of time). Since Mr. Samad is competing with Mr. Nevilles for the license, there is a motive to attempt to cast doubt on his reliability. To allow that testimony would have invited rebuttal from Nevilles. Only delay and confusion of the record would have been the result. Such testimony would not provide decisionally useful evidence.

KUCB-FM. (Knox, Tr. 1342-50.) He was instrumental in overcoming zoning barriers to the erection of a tower. (Knox, Tr. 1555.) However, after the station initially went on-the-air, Dr. Knox took up teaching at North East University in Chicago. He also traveled to the middle east and to Switzerland where he participated in international peace negotiations. (Knox, Tr. 1374.) It is concluded that Knox was not significantly instrumental in assisting the station in overcoming the setbacks that caused it to go silent for a two year period. However, he was in regular contact with station management, he remained an officer and a director until he was allegedly replaced by Mr. Ford in 1990, and he prepared and filed the renewal application and an ownership report that reflected his position to be president of Center.

Misrepresentation Issue

47. When it filed its renewal application on January 31, 1990, Center answered "No" to the following question:

> Since the filing of the applicant's last renewal application for this station or other major application, has an adverse finding been made or final action been taken by any court or administrative body with respect to the applicant or parties to the application in a civil or criminal proceeding, brought under the provisions of any law relating to the following: any felony; broadcast related antitrust or other unfair competition; criminal fraud or fraud before another governmental unit; or discrimination?

(MMB Exh. 12 at 3.) The application also required the following certification to which Center, through Mr. Jamal Long, answered affirmatively:

> I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

(MMB Exh. 12 at 3.) Mr. Long is identified under his signature as vice president and there is no issue about his authorization to sign and certify for the renewal applicant in that capacity. Mr. Long's signature was affixed to the certification on January 22, 1990. (*Id.*) However, his signature was made by Dr. Knox. (Knox, Tr. 1415.)

48. The ownership report accompanying Center's renewal application listed Charles Knox as President. The ownership report form includes the following statement:

> I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

The signature of Mr. Long also follows this certification, with the title vice president, and bears the date January 22, 1990. (MMB Exh. 12 at 405.) However, Knox testified that he also signed Long's name to the ownership report. (Knox, Tr. 1415.)

49. On June 1, 1987, a Judgment and Probation/Commitment Order was filed in the United States District Court for the Western District of Texas. The writ made known the fact that Charles Knox, of Chicago, Illinois, was convicted of committing a federal crime as follows:

> on about October 24, 1985 and December 1, 1985, defendant did knowingly and willfully make a materially false, fictitious and fraudulent statement and representation - - - to wit that the defendant was a licensed attorney in the State of Illinois for purposes of attorney-client visitation with an inmate, and the defendant then and there well knew and believed that he was not a licensed attorney in the State of Illinois, all in violation of 18 U.S.C. §1001 as charged in counts 1 and 2 of the indictment.

Knox was sentenced to three years' imprisonment, five years' probation, a $10,000 fine, and a $100 special assessment. (MMB Exh. 15.)

50. A Judgment Including Sentence docketed on September 29, 1989, in the United States District Court for the Northern District of Illinois reflected that Charles Knox had pleaded guilty to conspiracy [18 U.S.C. §371]; racketeering [18 U.S.C. §1962(d)]; and theft by embezzlement [18 U.S.C. §641]. (MMB Exh. 16.)

51. Dr. Knox plead guilty to conspiring to commit mail fraud and wire fraud and to use the means of interstate commerce in connection with extortion and bribery. (MMB Exh. 17 at 1-2; MMB Exh. 18.) He also pleaded guilty to one count of the superseding information which charged that Dr. Knox had received on behalf of KUCB the sum of $72,484 from the National Telecommunications and Information Administration ("NTIA"). The document states in part:

> As defendant [Knox] knew and understood, the grant money was supposed to be used to purchase radio equipment to operate a minority-run radio station. Instead, the defendant knowingly diverted at least $31,181.15 - - - for purposes other than radio equipment.

(MMB Exh. 17 at 4-5; MMB Exh. 18 at 56.) For embezzling funds that were designated for the station he was advising in its affairs, Dr. Knox was sentenced to three years' imprisonment. Knox received five years' probation, was ordered to make restitution of $29,000, and was further ordered to complete 500 hours of community service. (MMB Exh. 16.)

52. Mr. Nevilles testified that in 1987, he read about Dr. Knox's conviction in the *Des Moines Register*. There was local newspaper coverage regarding Knox's 1987 conviction in March and April 1987. (MMB Exhs. 24, 26.) Nevilles represented that there was widespread knowledge at KUCB about the Knox conviction, and that while he was KUCB's assistant manager, the station broadcast a solicitation for money to benefit Knox's legal defense. (Nevilles, Tr. 722, 730-31, 739, 762-63, 765-66.) This is conclusive unrebutted evidence that Center knew about Knox's convictions before 1990.

53. In an attempt to cover up incriminating circumstances, Mr. Long testified that Charles Knox was not involved in Center's operations in 1990. Yet an ownership report accompanying the renewal application dated January 22, 1990, listed Charles Knox as Center's President. (MMB Exh. 12 at 4-5; Long, Tr. 995-97.) Mr. Long stated that the ownership report bears his signature. (Long, Tr. 997.) And according to Mr. Long, Dr. Knox was not involved with the station on April 12, 1988, the date that Long signed yet another ownership report listing Charles

Knox as President. (MMB Exh. 1 at 87-88; Long, Tr. 998.) Finally, Mr. Long represented that an ownership report signed by Mr. Samad on May 23, 1987, also erroneously listed Charles Knox as President. (MMB Exh. 1 at 89-90; Long; Tr. 999.) Center's board member, Mr. Samad, stated that the board decided not to retain Charles Knox on Center's board and decided to remove him in December 1989. But no minute of such a meeting or confirming letter was produced.

54. In an effort to claim "mistake," Mr. Long testified that he had hurriedly completed the renewal application and that he did not then know that Knox had been convicted of a felony. (Long, Tr. 953-57, 1004-05.) Upon his being shown newspaper reports, Mr. Long acknowledged that he had been involved with a committee to raise funds on Dr. Knox's behalf. (Long Tr. 1005, 1028-31.) Charles Knox recalled the existence of a legal defense fund for his benefit which was operative in 1987. Charles Knox does not remember discussing his legal problems with anyone at the station. (Knox, Tr. 1439-40.) Mr. Samad testified that as of January 31, 1990, he was not aware that Charles Knox had been convicted of a felony or that Knox had been the subject of criminal charges. Samad stated that he did not know that Knox had been the subject of criminal charges. He stated that he did not read the newspapers and that he did not participate in any of the efforts to raise funds for Dr. Knox's defense. (Samad, Tr. 1133-34, 1136, 1180.) KUCB's general manager, Mr. Kalonji Saadiq, asserted that he learned of Dr. Knox's 1987 Texas conviction in 1991. (Saadiq, Tr. 1312-13.) He also asserted that he does not read the newspaper. (Saadiq, Tr. 1321.)

55. Charles Knox testified that at the request of Jamal Long, he assisted with the preparation of Center's renewal application. (Knox, Tr. 1413-14.) The listing of his name on the attached ownership report was a mistake, according to Knox, because he was not then on Center's board of directors. (Knox, Tr. 1401.) However, Dr. Knox later admitted that it was his handwriting on the ownership report. (Knox, Tr. 1415.) Knox had signed the ownership report and the renewal application with the name "Jamal Long." Knox testified that he did so with Long's permission. But the signatures do not indicate that another person signed Long's name. (Knox, Tr. 1415.) Dr. Knox sent both forms directly to the Commission for filing. (Knox, Tr. 1414-15.)

56. Center asserts that there is no evidence of a misrepresentation or a concealment of material facts from the Commission for the failure to acknowledge Knox's convictions in the renewal application. (Center's PFC at 29.) Center argues for the conclusion that no one who had any responsibility at Center for signing the hurriedly prepared renewal application knew of the Knox convictions. (Center's PFC at 29-33.) Mr. Long testified that it was sometime in 1990 that he first learned of the convictions which was after he had signed the application. (Long, Tr. 956.) This testimony is not true or correct. Mr. Long testified that in 1987, he had worked on a project to raise funds for Dr. Knox's defense. (Long, Tr. 1028-30.) It was also established that news stories of the Knox convictions appeared in *The Des Moines Register* on March 4, 1987. (MMB Exh. 24.) *The Des Moines Register* is recognized by the Presiding Judge as a newspaper of general circulation in Des Moines.[14] Mr. Long testified that it is his practice not to read *The Des Moines Register*. (Long, Tr. 1028.) His denial is suspect given the fact that other Center principals also deny reading about Knox's convictions in the newspaper. (Saadiq, Tr. 1321.) It is an incredible factual position to assert that no one with responsibility at the station knew about Knox's 1987 and 1989 convictions. Doubts about the truthfulness of Center's asserted lack of knowledge are increased by the fact that the 1989 conviction involved a diversion of NTIA funds that were awarded to KUCB at a time when KUCB needed funds to hire a full-time engineer and to purchase functioning equipment in order to stay on-the-air.

57. Mr. Samad also testified that he was unaware in 1987 of *The Des Moines Register* news articles. (Samad, Tr. 1136.) It is unreasonable to accept as a fact that managers of a broadcast station would not at least skim a local newspaper to learn of potential stories of local interest.[15] Long's testimony of having no knowledge of the Knox convictions is incredible when other persons who did read *The Des Moines Register* or who learned of the convictions and/or Knox's embezzlement could be expected to have informed Long who was the station's manager. And it is factually incredible testimony on the part of Mr. Long that he did not speak to any of the KUCB staff or board members about Knox's convictions prior to 1990. (Long, Tr. 1005.) Again, it is particularly noteworthy that the 1989 conviction just prior to the filing of the renewal application involved Knox's wrongful taking of grant monies of about $30,000 that were designated for KUCB.

Control/Ownership Reports Issue

58. The Commission set an issue to determine whether the true officers and directors of Center were disclosed to the Commission and also whether there had been an unauthorized transfer of control and filings of false ownership reports with the Commission. *See HDO* Para. 16(f). The Bureau seeks findings on one operative set of facts which are relevant to three separate issues:

> (a) whether there was an unauthorized transfer of thirteen members of the governing board in 1979 to four members in 1987;
>
> (b) whether there were failures to file accurate ownership reports with the Commission between 1979 and 1987 in violation of the Commission's rules [47 C.F.R. §73.3615(f)];
>
> (c) whether Center had been intentionally misleading the Commission with respect to its ownership reports.

[14] Newspaper articles were refused as evidence by the Presiding Judge except for the limited purpose of proving that in fact an article was published. The evidence is not received for the truth or accuracy of the news article but only for the fact that the article was published. (Tr. 1193-95.) *See* consistent rulings on newspapers offered by Acorn and rejected. (Tr. 131-32.)

[15] *The Des Moines Register* submitted a letter of endorsement to the Commission in support of Center's renewal. (*See* rejected Center Exh. 104: ltr dtd. February 28, 1992 from Charles C. Edwards, Jr., President and Publisher, *The Des Moines Register.*)

59. Center filed its initial application for a construction permit on January 19, 1978, on an application Form 301 that was signed by Richard A. Bates as chairman of the board of directors. The first periodic ownership report was dated May 30, 1979, and it identified the following thirteen officers and board members:

Linda Hardnett, President
Mary Lincoln, Treasurer
Barbara Simmons, Vice President
Vanessa Shade, Secretary
John Henderson, Board Member
Albert L. Bibbens, Board Member
Marlene Shade, Board Member
Margaret Shade, Board Member
Vernita Moss, Board Member
Harris Ceaser, Board Member
Jamal Long, Board Member
Edward Turner, Board Member
Harry Flipping, Board Member

The ownership report noted that all of these persons were appointed or elected by Center's board of directors. (MMB Exh. 1, at 84-86.)

60. Center's next ownership report was submitted eight years later on May 23, 1987.[16] The report identified the following persons as officers, members of the board and/or holders of ownership interests of 1% or more:

Charles Knox, President
Crystal Peavy, Vice President
Imam Ako Abdul-Samad, Vice President
Mary Lincoln, Treasurer

The report reflects that these persons were all appointed or elected by Center's board of directors. (MMB Exh. 1 at 89-90.) Mr. Samad testified that the foregoing list is incomplete. He explained that at the time of its submission, he believed that the report did not require a list of all board members, but only the board members who were officers. Mr. Tommy Briscoe and Mr. William Tyson were also board members. Recently, Mr. Samad learned that he was mistaken with respect to the Commission's requirements. Accordingly, Center's latest ownership report lists all Board members as represented by Mr. Samad. (Samad, Tr. 1186, 1188-89.) *See* Center's ownership report dated August 15, 1991. (MMB Exh. 28.)[17]

61. On April 12, 1988, Center filed an ownership report that was signed by Mr. Long in the capacity of executive director and secretary. (MMB Exh. 1 at 88-89.) The report identified the following persons as officers, members of the board and/or holders of ownership interests of 1% or more:

Charles Knox, President
Crystal Peavy, Vice President
Ako Abdul-Samad, Vice President
Mary Lincoln, Treasurer

The report states that each of these persons was appointed or elected by the Board. (MMB Exh. 1 at 87-88.) The ownership report had attached an undated document entitled "Roster of Board of Directors" disclosing as Center's directors Charles Knox, Crystal Peavy, Ako Abdul-Samad, Jamal R. Long, Harris Caesar, and Mary Lincoln. (MMB Exh. 1 at 88-A; Tr. 165-67 [MMB Exh. 1 p.93 renumbered p. 88-A].)

62. On January 30, 1990, when Center filed its renewal application, Center also submitted an ownership report which identified the following persons as officers, members of the board and/or holders of ownership interests of 1% or more:

Charles Knox, President
Crystal Peavy-Thomas, Vice President
Ako Abdul-Samad, Vice President
Jamal Long, Vice President
Mary Lincoln, Treasurer

This ownership report states that each of the above persons was appointed or was elected by the board of directors. (MMB Exh. 12 at 4-5.)

63. Center filed an ownership report on March 9, 1990, that was signed by Mr. Wayne Ford as president. (MMB Exh. 1 at 91-92.) The report identified the following persons as officers, members of the board and/or holders of ownership interests of 1% or more:

Wayne Ford, President
Ako Abdul-Samad, Vice President
Jamal Long, Secretary
Bernee Long, Treasurer

The report represents that each of these persons was appointed or was elected by Center's board of directors. (*Id.*) However, not all directors were listed. Testimony estab-

[16] There actually were two ownership reports that were submitted by Center to the Commission that were dated May 23, 1987. One was handwritten and was admitted to be incomplete and mistakenly sent to the Commission. (MMB Exh. 1 at 97.) There was no reliance on the mistaken report which was identified by Center as a mistake in answers to the Bureau's request for admissions. There will be no adverse finding as to the mistaken report.

[17] This was the latest ownership report while the hearing record was open. It was offered into evidence by Bureau counsel. (Tr. 1329-30.) The officers/directors listed are: Wayne Ford,

lished that Ms. Crystal Peavey, Ms. Mary Lincoln, Mr. Tommy Briscoe and Mr. Bill Tyson were directors who were mistakenly omitted. (Samad, Tr. 1186.)[18]

Wayne Ford, President

Crystal Peavey, Vice President

Ako Abdul-Samad, Vice President

Jamal Long, Secretary

Patricia Fuller, Treasurer

Tommy Briscoe, Board Member

Mary Lincoln, Board Member

Mary Brewer, Board Member

William Tyson, Board Member

64. The above evidence on the make-up of Center's officers and board of directors, and the changes at various dates, are considered in the context of evidence relating to the promotion and origin of Center as a non-profit broadcast venture to provide an Afro-American broadcast voice in Des Moines. (Knox, Tr. 1345.) Mr. Samad, who has been working at KUCB since its inception, testified in his capacity of Center's vice president that Ms. Joanna Cheatom, who is now deceased, and Dr. Knox were the promoters of KUCB in 1979. (Samad, Tr. 889, 1255.) That conclusion was corroborated by Mr. Saadiq (Tr. 1344). Dr. Knox, who had a law degree and some experience with broadcast licensing, provided legal advice and services at the outset. (Saadiq, Tr. 1257-58; 1300-01.) Dr. Knox described himself as the person who provided the most direction at the station's organizational stage and he personally directed the filing of documents with the Commission and the obtaining of necessary information through community surveys. (Knox, Tr. 1349-50.) It is concluded that Knox was materially instrumental to the organization and the initial licensing of Station KUCB-FM.

65. The initial thirteen officers and directors did not include Dr. Knox as a disclosed principal. (MMB Exh. 1 at 84.) Knox testified that when Center filed its initial application he was a consultant. In Knox's early correspondence dated January 25, 1979, January 9, 1980, March 17, 1981, and July 24, 1981, he identified himself as "consultant." (MMB Exhs. 3,5,6,7.) He testified that he did not have a position on Center's governing board. (Knox, Tr. 1356.) Knox also testified that the first ownership report of May 30, 1979, which did not include Knox, was accurate. (Knox, Tr. 1419.)

66. The record does not reflect any work performed by the initial officers on behalf of Center. According to affidavits filed with Iowa's Secretary of State, Ms. Linda Hardnett, Center's first president, and Ms. Barbara Simmons, Center's first vice-president, resigned those offices in April and June of 1981. (Center Exh. 7 at 15-16.) Thereafter, Knox's signature appeared as vice-president of Center on a letter dated September 30, 1982, that was addressed to the Commission's Secretary. (MMB Exh. 9.) While there is no testimony or admission with respect to that letter, it appears to have been written on Center stationary and there has been no rebuttal evidence to show that Knox did not sign the letter or that he had no authority to sign official correspondence as a vice-president of Center.

67. The evidence establishes through the Bureau's request for admissions that Dr. Knox signed a letter dated April 22, 1983, as vice president of KUCB, which letter was addressed to the Commission's Chief Engineer in Kansas City. (MMB Exh. 1 at 10, 96.) Thereafter, on March 28, 1984, Knox signed Center's letter to the Commission Secretary as its vice president and legal consultant. (MMB Exh. 10.) On December 10, 1984, Knox signed a letter to a Bureau Engineer as Center's president which letter responded to a telegram and which letter transmitted to the Commission such technical data as tower location, height, power output, and transmission efficiency. (MMB Exh. 1 at 15, 96.) And on February 24, 1986, a letter was sent to the Commission under Knox's name as Center's president. (MMB Exh. 1 at 54-56, 100.)

68. Knox testified that he attempted to resign from Center's board through a telephone request in 1986, but his resignation was not accepted. (Knox, Tr. 1397-98.) Knox testified that he resigned from the board in writing in 1989. (Knox, Tr. 1400.) But there is no documentary evidence in the record to confirm that fact. Nor was there testimony offered of any independent participant in any board meeting in which Knox's resignation was considered or accepted.

69. Center asserts in its brief that "there is some confusion as to exactly when Charles Knox ceased his participation with KUCB." *See* Center's PFC at 34. Actually, there is not any substantial evidence in the record to establish that he has resigned. Center admits that Knox represented in his testimony that he continued to provide assistance to Center "long after" Knox had submitted his resignation in writing. *See* Center's PFC at 35. Center characterizes Knox's testimony as asserting that he had little involvement with the station during 1987-89 which substantially covers the two year period that KUCB was silent without authorization. (*Id.*) But Knox's testimony to that effect is not consistent with the documentary evidence that was introduced by the Bureau. That evidence consists of Center's business records wherein Knox is shown to have communicated with the Commission on significant station business in 1983, 1984 and 1986 as its vice president and president. Nor do Knox's verbal disclaimers rebut the presumption of Knox's active control and influence in the period 1988-1991 by virtue of the inclusion of his name in Center business records, i.e., the ownership reports for 1987, 1988, 1990 and 1991. (*See* Paras. 63-67, *supra.*) Knox's name also appeared on the renewal application as Center's president. (MMB Exh. 12.)

70. Knox's testimony concerning an attempt to orally resign from the board by telephone is given little weight because, as a lawyer, Dr. Knox would know that an effective resignation would be submitted in writing or, if submitted orally, it would be acted upon at a board meeting after a telephone call. The facts as set forth in Paragraph 12, *supra* constitute substantial evidence that Center was conceived and established as a membership organization.

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president; Crystal Peavey, vice president; Ako Abdul-Samad, vice president; Jamal Long, secretary; Patricia Fuller, treasurer; Tommy Briscoe, member.

[18] Mr. Samad stated in his testimony that he had prepared the report in his capacity of Center's vice president. Mr. Samad had mistakenly omitted listing the directors in an earlier report and he mistakenly repeated the error on the ownership report of March 9, 1990. (Samad, Tr. 1986-87.)

Changes to the board membership were consistently made by the directors. Also, there is no evidence to show how many members there were and whether members went beyond the officers and directors reported in the ownership reports. And there was no rebuttal evidence offered by Center to show that there were regular membership meetings or special meetings called to decide on changes to the board's membership. Nor was Commission authorization sought for any change in control that may have been effected. It is concluded that corporate decisions were made informally by persons who were Center's officers and directors.

71. Evidence reflects that Ms. Iris Ward, daughter of Center's founder Joanna Cheatom, responded to a Commission telegram seeking technical data for Center's tower. (MMB Exh. 1 at 16-17.) Ms. Ward signed a letter dated October 3, 1986, as Center's vice president in which she reported certain of the data to the Commission. (MMB Exh. 1 at 18.) The Bureau also cites to Iowa state documents concerning an Application for Reinstatement and a Statement of Change of Registered Office as Registered Agent which Ms. Ward signed before a notary on August 7, 1986, as a Center vice president.[19] (Center Exh. 7 at 17-18.) Mr. Nevilles testified that Ms. Ward had disclosed to him that she had at one time served on the board. Dr. Knox confirmed that Ms. Ward had served as a board member in 1986, and that she had served less than one year. (Knox, Tr. 1382, 1427-28.) There is no evidence that establishes that Ms. Ward was ever a vice president or president of Center. It is concluded from this evidence that Ms. Ward lent her name to accommodate state filings and to accommodate a report to the Commission. It is found that those acts of accommodation do not establish an exercise of control by Iris Ward. Nor was the Commission misled on a material matter since there were no repeated misrepresentations and no motive to deceive or evidence of a deception.

72. In 1987, Mr. Samad requested that the Commission grant an extension of time because "KUCB is under new management." (MMB Exh. 1 at 21, 97.) When the Commission made inquiry about a possible transfer of control, on July 31, 1987, Mr. Samad advised:

> - The most recent Ownership Report file does accurately reflect the current composition of the Permittee.
>
> - Control of the Permittee has never been transferred.
>
> - Mrs. Iris Ward is no longer a member of "the Board, therefore, her name does not appear on our recently submitted Ownership Report.
>
> - Dr. Charles Knox is the President of the Center for the Study and Application of Black Economic Development and KUCB FM Radio. See recent Ownership Report.

(MMB Exh. 1 at 23, 33, 97-98, paras. 17-20.)

73. Dr. Knox admitted that he was Center's president from 1985 until he resigned in 1989. (Knox, Tr. 1397, 1400, 1406.) While Knox claims to have had little involvement with the station between 1987 and 1989, he admitted that he went to the station in 1987 to inspect the damage to the transmitter. (Knox, Tr. 1365, 1387-88, 1391.) He also was involved with the station's move in 1989. (Knox, Tr. 1367.) According to Dr. Knox, Mr. Wayne Ford requested Knox's resignation in 1989. (Knox, Tr. 1400, 1416.) Knox testified that the listing of his name as president in Center's renewal application on January 22, 1990, was a mistake. (Knox, Tr. 1400-01.) Still, Knox admitted that he completed an ownership report for 1990 to which he affixed the name of Jamal Long. (Knox, Tr. 1415.) As of the hearing, Knox has been advising Center on significant matters and Center continues to seek his technical advice on the operation of the station. (Knox, Tr. 1417-18.) Center has failed to meet its burden of proof and it is found that there is substantial evidence in the record to conclude that Knox was Center's *de novo* chief executive officer at all times that he was listed in ownership reports as Center's president and at the time that Center's renewal application and an ownership report were filed in January 1990.[20]

74. On January 26, 1990, Mr. Wayne Ford undertook to sign a memorandum for Center as its president reciting that Mr. Eugene Fowler had been appointed the station operator by the board of directors. (MMB Exh. 1 at 76.) However, Dr. Knox is identified as Center's president on the renewal application that was filed four days earlier on January 22, 1990. (MMB Exh. 12.) There has been no record or testimony of Mr. Ford which would support a finding that he became president. For example, there is no corporate document or resolution appointing Ford to the position. And since Center is a nonprofit venture there are no salary payments that would assist in making a record. The Commission has assigned the burden of proof to Center and Center has the burden of proof to show that Mr. Ford is president and/or that Dr. Knox no longer shares control. Center has offered evidence in the form of an ownership report as of January 1992. (Center Exh. 1.) Center's corporate secretary, Mr. Jamal Long, certified to its accuracy. (Long, Tr. 989-90.) The report reflects the following make-up of Center's officers and directors:

> Wayne Ford, President
>
> Crystal Peavey, Vice President
>
> Ako Abdul-Samad, Vice President
>
> Jamal Long, Secretary
>
> Patricia Fuller, Treasurer
>
> Tommy Briscoe, Member
>
> Mary Lincoln, Member
>
> Hadaasha Maryum, Member

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[19] In fact, the word "vice" was stricken on one document and Ms. Ward was represented to be signing before a notary as Center's president. It appears that the notary's jurat was pretyped to reflect that a president had signed. There is no evidence from ownership reports that Ms. Ward ever served as Center's president or as a vice president. (Center Exh. 7 at 18.)

[20] Dr. Knox testified that when he learned that his name was on the application, he advised Mr. Long and Mr. Samad by telephone that a mistake had been made and he instructed them to file a correction with the Commission. But he also testified that he was not surprised to see his name on the report. (Knox, Tr. 1411.) There is no corroboration of Knox's testimony that he wanted to correct the report. Nor is there any evidence that Knox followed-up to assure a correction. The testimony of Knox does not demonstrate a sufficient effort to effect a correction. Therefore, the ownership report forms and the renewal application accurately reflected Knox to be Center's president through January 1990.

Bernee Long, Member

Williams Tyson, Member

Harry Ceaser, Member

The testimony of Mr. Saadiq, together with an implicit request for a presumption of regularity with respect to the document,[21] seeks to establish that Dr. Knox was no longer an officer and/or director of Center in January 1992. (Saadiq, Tr. 1315.) However, there was no document produced to show a written resignation that was accepted by the board and, based on Knox's testimony, it is found that Center still consults Knox.

75. Center has failed to offer substantial proof that its by-laws have been followed in connection with appointments to its governing board. Specifically, the by-laws provide:

> Section 2.1. *Membership*. The members of this corporation shall be those joining from time to time by payment of a membership fee, which shall not be less than $1.00.
>
> Section 2.2. *Voting Rights*. Members of this corporation shall be entitled to vote on any matter.

(Center Exh. 9 at 2.) There are no records showing the membership of Center at the various times that ownership reports and the renewal application were filed. The by-laws provide for governance by a board of directors who must be members. (*See* By-laws Section 3.1. *General Powers* and Section 3.2 Number and Qualifications.) (Center Exh. 9 at 3.) Thus, there is not a sufficient record to show that the board was properly constituted, or that there was a formal vote for officers, or that there was a quorum present when officers were elected. The testimony indicates only that Center has never had ""members", except for its board of directors which selected its own directors and officers. (Long, Tr. 1002-04; Samad, Tr. 1161; Saadiq, Tr. 1318-19; Knox, Tr. 1428.) It cannot be determined with precision that Center acted in accordance with its by-laws.

The Financial Issue Against Acorn

76. The added financial issue requires evidence on whether Acorn has a reasonable assurance of its financing. Acorn was assigned the burden of proceeding and the burden of proof on the issue. *See* Para. 4, *supra*. Acorn had certified "No" to its financial ability in its application. Thereafter, Acorn certified "Yes" to its financial ability on August 29, 1991, when it sought to amend its application to reflect that it was financially qualified. *See Order* FCC 91M-3004, released October 3, 1991. A second amendment was filed on September 20, 1991, and was accompanied with a showing of "good cause."

77. As found above, Acorn is a nonprofit corporation and is a wholly owned subsidiary of Acorn National Broadcasting Network ("ANBN") which is located in New Orleans. (Acorn Exh. 1 at 1; Green, Tr. 468-69.) ANBN also is a nonprofit corporation which was formed to acquire, own and operate broadcast stations. (Acorn Exh. 2 at 1.) ANBN intends to retain its 100% ownership of Acorn in order to insure that the overall public interest policy of ANBN will be carried out by Acorn at the local Des Moines station. (*Id.*) But there is no evidence that ANBN intends to contribute financing for Acorn's venture in Des Moines.

78. Acorn's president, Pauline Green ("Green"), offered written testimony on Acorn's organization and purposes and on the programming intended for Des Moines. (Acorn Exh. 1.) Her written testimony does not address the financial issue. On cross-examination, she stated that Acorn contacted Affiliated Media Foundation Movement ("AMFM") which is located in New Orleans. (Green Tr. 473.) According to Ms. Green, Acorn did not submit any financial statement to AMFM. (Green, Tr. 474.) On December 27, 1989, Acorn entered into a contract with AMFM wherein the latter agreed to provide technical assistance on engineering, financial, legal and other functions relative to Acorn's application. (Acorn Exh. 9.)

79. Mr. Dale Rathke ("Rathke"), an officer of AMFM, submitted written testimony. (Acorn Exh. 3.) Mr. Rathke testified that based on his experience as a consultant to radio stations, a review of Acorn's business plan, and AMFM's knowledge of Acorn through loans for prosecution expenses, AMFM issued a letter to Acorn dated December 27, 1989, which states in part:

> This letter will confirm the willingness of Affiliated Media Foundation Movement (AM/FM) to secure funding for Iowa Acorn Broadcasting Corporation - - -. We are able to make a commitment of $730,000 in the form of unsecured loans - - -.

(Acorn Exh. 3, Att. B.) The term of the loan was five years and the rate of interest was 2 points above prime. (*Id.*) However, AMFM was acting only as an intermediary source. A financial institution doing business as the United States Trust ("UST") agreed to provide only AMFM with funding. There was no privity between Acorn and UST.

80. The operable UST commitment letter dated July 2, 1990, stated:

> This letter states the conditional commitment of our investment management clients to loan up to $700,000 to assist AMFM in the financing for construction and initial operation of a radio station licensed to Des Moines, Iowa. Their willingness to do so is subject to the following conditions: . . .
>
> 2) All reasonable and ordinary credit criteria of the United States Trust Company (the "Bank") are met at such time as IABC [Acorn] (a) has received the permit to construct said station and (b) requests from our clients via the Bank a formal and unconditional lending commitment; and,
>
> 3) The Bank receives, once the above conditions have been met, the written agreement to the terms of the loan from each and all of our investment manage-

[21] The document is not wholly accurate. Mr. Saadiq, the station manager testified that to his knowledge, Mr. Harry Ceaser was not a board member. (Saadiq, Tr. 1315.) Also, the name Hadaasha Maryum is the same as Mary Brewer as the latter name was reported on August 15, 1991. (Cf. MMB Exh. 28; Saadiq, Tr. 1319.)

> ment clients participating in the loan.... The precise terms of security of the loan also will be determined at the time of the unconditional loan commitment....

(Acorn Exh. 3, Att. C.) The letter was addressed to Mr. Jeff Murphy of AMFM and was signed by Stephen K. Moody, Senior Vice President, US Trust. (*Id.*) There were no copies sent to Acorn, or to its agents, or to its officers.

81. As the UST letter reflects, the financing scheme contemplates that the bank's "investment management clients" must later agree to fund a loan for $700,000. Those clients, who are not in privity with Acorn, also must be satisfied that Acorn can meet "credit criteria" when Acorn is awarded the permit. Thus, the "commitment" as of July 2, 1990, was a conditional one which extended only to AMFM and which would require funding by individual clients. There was no commitment from a financial institution to Acorn which was the basis of Acorn's certification. Furthermore, there is no evidence that UST, the "bank" that would obtain the loan funds from investors, had knowledge of Acorn's programming plan or any knowledge of the principals of Acorn who would operate the station and their related experience to operate. UST even refused to disclose to the Bureau information about its "investment management clients" who would be the source of the loans. (Acorn Exh. 3 Att. D.) UST requires that Acorn meet the "ordinary credit criteria" of UST without disclosure to Acorn of what are the criteria. (Acorn Exh. 3 Att. C.) And one of the terms of the loan contemplates "requiring a pledge of the stock of [ANBN]," the corporate entity which is the sole stockholder of Acorn. (*Id.*) The result of such a pledge would be to transfer control of the station to UST. There is nothing in the documentation to show that there is any intention to apply to the Commission for an authorized transfer.

82. Any future commitment to AMFM would require a written agreement to the terms of a loan from each investment management client who might later agree to participate in a loan to Acorn. Terms of the loan would be determined at the time of a commitment. In that regard, UST contemplates charging an interest rate at 2% above prime for a period of 5 years and a pledge of Acorn's stock. The letter to AMFM (and not to Acorn) concludes as follows:

> This Bank [UST] is personally and favorably acquainted with you [AMFM] and we would be relying on your commitment to continued participation in the venture and *management of the radio station* as a part of the loan application.

(Acorn Exh. 3.) (Emphasis added.) But AMFM is not contemplated in Acorn's proposal as the "manager" of the radio station. Nor was AMFM the applicant party that certified to Acorn's financial ability to construct and operate the Des Moines station. Rather, Acorn is the applicant that certified, which certification has been a continuing one since Acorn filed its amendment in August 1991. Acorn intends to own, manage and operate the station according to its application, as amended, and there is no disclosure of management by AMFM.

83. Mr. Moody sent a second letter dated October 24, 1991, which was also addressed to AMFM. The letter enclosed UST's standard "Investment Management Agreement." (Acorn Exh. 3.) The letter explains that the standard agreement would give full discretion to UST to invest or loan on an individual client's behalf. The letter discloses that those individual agreements have not yet been obtained from UST's clients:

> There are no documents between [UST] and its investment management clients that specifically reference the construction and initial operation of a radio station licensed to Des Moines, Iowa.

(*Id.*) The form of the standard "Investment Management Agreement" provides for non-recourse unilateral termination upon 30 days written notice. Therefore, even if AMFM had agreements from clients in hand, there is no assurance that some or all of the clients would not terminate their commitments in the event that Acorn received the grant. (*Id.*)

84. Any assurance of UST or AMFM to provide financing for Acorn became even less reasonable and more tenuous after the testimony of Mr. Moody. Mr. Moody identified several clients who might be interested in making a loan to Acorn but there was no written confirmation secured. (Moody, Tr. 519-20, 522, 524-26, 530-31.) If no client agrees then no loan is made. (Moody, Tr. 530.) And if AMFM is not involved in the project, no loan will be made. (Moody, Tr. 533-34.) When the investment management clients learn that there can be no undisclosed real party-in-interest to an application and that there would be no management of the station by AMFM, it is likely that written confirmations will not be secured.[22]

85. By letter dated December 27, 1989, AMFM's Comptroller, Ms. Joanna Bishop, advised Ms. Green of AMFM's willingness to secure funding for Acorn. (Acorn Exh. 3, Att. B.) The letter recites that AMFM is "able to make a commitment of $730,000 in the form of unsecured loans." (*Id.*) The letter also recites terms including the length of the loan (5 years) the loan rate (2% above prima), and the required collateral (none). (*Id.*) The letter contains a statement under its terms which is an expression of a "willingness to secure such funding and make such funds available." (*Id.*) It is found that such evidence does not show a present firm commitment for AMFM to lend to Acorn the sum of $730,000, or to loan any substantial sum of money.

86. Rathke, AMFM's principal, testified in writing that he had reviewed Acorn's business plan which he recounted as including application expenses, equipment costs, construction costs, and costs for operating the station for three months. (Acorn Exh. 3 at 2.) But no written business plan

[22] The realistic consequence of this finding on AMFM's required involvement as a condition to obtaining UST funding would be to add an issue on whether AMFM is the real party-in-interest. *Seven Hills Television Co.*, 2 F.C.C. Rcd 6867, 6880 (Review Bd 1987) (power of purse may equal the power of control). Since UST is the contemplated pledgee of a numerical controlling majority of the stock pledged as collateral, an issue of UST's control would also be appropriate. *Id.* However, because the weight of the evidence establishes that Acorn is not financially qualified to receive a grant, there would be no public interest served in adding additional qualifying issues.

was offered in evidence. And Rathke testified that in fact he had arrived at a figure of $700,000 as an amount that provided sufficient funding based on his experience as a consultant to other community radio stations. (Acorn Exh. 3 at 2.) Ms. Green also testified that a budget estimate was made based on AMFM's expertise and experience with other stations which it operates. (Green, Tr. 492, 494.) It is found that there was no substantial evidence introduced to show that an actual estimate was made of Acorn's projected expenses or that a comparable project was used for an estimate of comparable costs.

87. As further evidence that the $700,000 estimate was raw speculation and lacked any foundation in reasonable fact, Moody and Rathke testified that in actuality the likely amount of the loan would be $150,000. (Moody, Tr. 518, Rathke, Tr. 548, 561.) Mr. Rathke surmised that the $700,000 figure was a mistake on the part of UST in using another unrelated project as the basis for the estimated costs because the $700,000 estimate clearly was excessive for Acorn's needs. (Rathke, Tr. 550, 551.) However, since UST was relying on AMFM for the project's management, it is more likely that the mistake was AMFM's. In fact, on December 27, 1989, AMFM was committing to secure $730,000 and on July 2, 1990, UST was referring to a conditional loan commitment of $700,000. (*Compare* Acorn Exh. 3, Att. B and Att. C.) It is also found that since AMFM's letter to Acorn dated December 27, 1989 was written before UST's letter to AMFM of July 2, 1990, there was not even a conditional UST/AMFM funding commitment in place and no foundation in fact as of the date of the AMFM letter to represent to Acorn that it had a reasonable assurance of funds in the amount of $700,000, or a reasonable assurance of funds in any significant sum. Rathke testified that the AMFM letter to Acorn was merely to set forth the terms for which it was negotiating with potential lenders. (Rathke, Tr. 563-64, 567.) Therefore, it is found as a fact that Acorn could not rely on AMFM's letter dated December 27, 1989, for any reasonable assurance of funding.

CONCLUSIONS OF LAW

88. Section 307(b) of the Communications Act of 1934, as amended, the (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standard in determining which applicants meet that standard. The comparative standard was established for noncommercial broadcast facilities in the case of *New York University*, 10 Radio Reg. 2d (P&F) 215 (Comm'n 1967). There the Commission held:

> We are not persuaded that our traditional areas and population, and other available services criteria are appropriate in this instance, nor are we persuaded that the factors involved in the usual standard comparison [footnote omitted] are appropriate in the context of this proceeding.

10 Radio Reg. 2d (P&F) at 216.

89. The Commission articulated the issues to be tried in that case which included a comparative coverage issue limited to noncommercial FM "available services" and a specially drafted comparative standard:

> To determine the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants or whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

10 Radio Reg. 2d (P&F) at 217.[23]

90. Only basically qualified applicants need be compared. Therefore, before conducting a comparative analysis, a determination of the basic qualifications of Center and of Acorn will be made. *Louis Adelman*, 28 F.C.C. 432 (Comm'n (1960), *recon. denied* 29 F.C.C. 1223 (Comm'n 1960), *aff'd sub nom. Guinan, et al.* v. *F.C.C.* 297 F.2d 782 (D.C. Cir. 1961). There are substantial questions raised about whether Center intentionally misled the Commission in failing to disclose Knox's criminal record while he was an officer and director of the applicant. There also are issues of an extended unauthorized silence and other facts which raise substantial questions about Center's basic qualifications. Acorn will be disqualified from receiving a grant if it is not financially qualified to construct and operate for three months without revenues.

91. Should Center and Acorn be eliminated from contention as a result of basic disqualification, there need be no comparative analysis. Since Minority has no basic disqualification, Minority would qualify to receive a noncomparative grant by default.

Comparative Coverage

92. Since the evidence was received, there will be contingent findings and conclusions made with respect to comparative coverage. Acorn finishes last under this analysis.[24]

93. The difference in total coverage between Center and Minority are insignificant. Both would serve a substantial population of approximately 100,000 persons. For that rea-

[23] The Review Board earlier determined there to be a two-fold measure of noncommercial broadcasting: (a) educational, cultural and entertainment programming; (2) programming in furtherance of the educational institution's instructional program. *New York University*, 10 F.C.C. 2d 53, 55 (Review Bd 1967). Later, the Board expanded the order of proof to include "the manner in which [noncommercial applicants] meet the needs of the community to be served." *Pacifica Foundation*, 21 F.C.C. 2d 216, 221 (Review Bd 1970). However, such evidence of ascertainment of community and cultural needs of a community are no longer required under the *HDO*. *See Real Life Educational Foundation of Baton Rouge, Inc.*, 6 F.C.C. Rcd 2577 (Review Bd 1991).

[24] In an early decision on the comparative standards for noncommercial cases, the Commission held that the criteria for commercial cases were "virtually meaningless" in noncommercial cases. *See New York University, supra*, 10 RR 2d at 216. However, there have been recognized exceptions to a total rejection of the criteria where its limited use as a comparative factor was evident under the "other factors" criteria. *See* e.g., *Seattle Public Schools*, 4 F.C.C. Rcd 625, 642-43 (Review Bd 1989) (comparative signal coverage considered a comparative other factor). *See also Real Life Educational Foundation of Baton Rouge, Inc.*, 6 F.C.C. Rcd 2577-78 (Review Bd 1991) (preference granted for auxiliary power). *Id.* (Review Board could not "conjure" any reason to "distinguish between commercial and non-

son, Center and Minority are entitled to a slight preference over Acorn. *See Family Broadcasting Group*, 93 F.C.C. 2d 771, 779 (Review Bd 1983). No applicant can provide greater than a fourth educational service and the difference of the service between Center and Minority are negligible. However, each would provide a new fourth service to approximately 100,000 more persons than would Acorn. Therefore, Center and Minority would be entitled to another slight preference over Acorn. *Radio Jonesboro*, 96 F.C.C. 2d 1106, 1113 (Review Bd 1984). And the combination of proposing superior total coverage and service to underserved areas warrant moderate comparative preferences for Center and Minority over Acorn.

Center's Disqualification

94. There are three distinct theories under the issues set by the Commission by which Center may be disqualified: (a) intentional misrepresentations to the Commission on substantial reporting matters and in testimony given in open court; (b) a course of inept conduct, which includes an extended unauthorized silence, that shows Center to be irretrievably inept to operate a station; and (c) an unauthorized prolonged silence which can justify a denial of renewal aside from whether the evidence supports a finding of ineptness.[25]

Center's Intentional Misrepresentations

95. The Commission has stated its policy on truthfulness as follows:

> [T]he propensity for an applicant to be truthful and reliable relate[s] to its basic qualifications to be a licensee. Once this fact is established, further comparative inquiry is of marginal benefit. [Fn. omitted] - -- [And] where evidence of bad character during the preceding license period is of such a nature as to raise a qualification issue, then such evidence should be considered.

Policy Regarding Character Qualifications In Broadcast Licensing, 102 F.C.C. 2d 1179, 1231-32 (Comm'n 1986) (hereafter "*Character Qualifications*"). The Commission regards character as similar to citizenship and financial ability for basic qualification to hold a Commission license. *Id.* at 1231 fn.122. In Center's situation as a renewal applicant, there are considered by the Presiding Judge false and misleading filings as to material facts and false or misleading testimony which misrepresented material fact to the Commission in open court. *See* Paras. 47-57, *supra*.

Commission Filings

96. The Commission cited Center in the *HDO* for misrepresenting material facts to the Commission in its renewal application form which Center prepared on January 22, 1990, and filed on January 31, 1990. (MMB Exh. 12.) Dr. Knox has admitted that he was Center's president from 1985 to 1989. *See* Para. 73, *supra*. Charles Knox was listed in the 1990 renewal application as Center's president. In response to a specific question in the form ("Question 6") Center denied that any party to its application, i.e., Charles Knox, had any adverse finding made or final court action taken against him. The signature of Jamal Long, Center's then vice president, was affixed to the application and under a certification that all statements were true. Long testified that he signed the application. But Knox contradicted Long and testified that he (Knox) had signed Long's name to the application. Similarly, an ownership report was submitted with Center's renewal application that purported to be signed by Long but which in fact was signed by Knox using Long's name. Again, Long testified that he signed the report but Knox contradicted Long and testified that he (Knox) had signed Long's name. That report disclosed Knox as Center's "president" and the letters were printed in a clear handwriting.

97. Why would Long and Knox undertake such a subterfuge not only in Center's filings but also in their disingenuous testimony? The motive is self-evident. First, it is clearly established that when Center's renewal application was filed in January 1990, Knox had two final convictions: one in 1987 for entering a federal prison under false pretenses, a felony; and one in 1989 for conspiracy, racketeering and theft by embezzlement of funds granted to KUCB-FM by the U.S. Department of Commerce, also a felony. (MMB Exhs. 15, 16.) The motive for having Knox sign Long's name to the renewal application, which was known to have been falsely checked "No" in response to Question 6, was to give Long and Center the deniability of a false filing. Knox represented himself as experienced in the Commission's application processes and as a trained attorney he is found to have had full knowledge of the significance of a "No" response to Question 6. Center held

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commercial applicants on the matter of emergency power"). Similarly, there is no reason to distinguish a minority preference. Congressional and Commission policies have been recognized by the Court for the proposition that "expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity." *Metro Broadcasting, Inc.* v. *F.C.C.*, 110 S. Ct. 2997, 3016 (1990). The Commission has similarly recognized in an earlier policy statement that:

> [M]inority ownership and participation in station management is in the public interest - - - because - - - it could be expected to increase the diversity of program content. (Footnote omitted.)

Minority Ownership Of Broadcasting Facilities, 68 F.C.C. 2d 979, 982 (Comm'n 1978). Similarly, officers and directors who are local residents would accommodate an ability to ascertain and meet community needs that would be superior to a non-resident controlled board of directors. Assuming substantial equality on proposed programming, Minority may also be preferred over Acorn on "other factors" because of the Des Moines residences of its controlling directors, who would be better situated to determine the city's needs and interests, and because of the superior quality of proof that Minority's identified board of directors will be comprised of persons who are minorities.

[25] There are two additional issues: a wrongful transfer of control and misrepresentations in failing to file ownership reports. The Bureau argues that there is insufficient evidence of intent to support a finding of misrepresentation of ownership reports. And Center is found as a matter of law not to have violated §310(d) of the Act through the change of local membership on Center's governing board. *See* Pp. 20-21, *infra*.

out Knox as its president in and before January 1990, and Center knew that Knox was a convicted felon. Therefore, under principles of agency law it is concluded that Knox's actions in checking "No" to Question 6 and signing Long's name to the renewal application and the 1990 ownership report are material misrepresentations that are directly attributable to Center. *Cf. Hillebrand Broadcasting, Inc.*, 1 F.C.C. Rcd 419-420 n.6 (Comm'n 1986) (application dismissed for failures of an agent).

98. There is an apparent inconsistency in Long's testimony because he testified that the signature was his own. Long may have been thinking that it was "his signature" since he had authorized Knox to sign his name. But Long also had a cover story which further shows an intent to deceive. Long testified that the renewal application and the ownership report were prepared in haste and that, in any event, he had no personal knowledge of Knox's criminal convictions in January 1990. Based on such testimony (which the Presiding Judge does not accept as truthful), it is concluded that Long was intentionally seeking to mislead the Commission into believing that he (Long) or Knox had mistakenly checked "No" to Question 6. But the testimony that Knox's convictions were not known to anyone who participated in preparing the renewal application is incredible under the attendant circumstances. The Bureau offered proof, which was received in evidence, that a newspaper of general circulation in Des Moines carried the story of Knox's first conviction in 1987. In addition, Long actively participated in a fundraiser for Knox's legal fees prior to the filing of Center's renewal application. And even if Long did not actually read the local newspapers, his work in and around the radio station would present numerous opportunities to learn from others who followed the local news that Dr. Knox had been convicted of felonies in 1987 and in 1989. It is inferred from the totality of the circumstantial evidence that Long knew that Knox had the two felony convictions when Center prepared and filed its renewal application in January 1990. And certainly Knox knew when he assisted in preparing the renewal application that he had multiple felony convictions that were required to be disclosed in Question 6. Knox's assertion that the application was completed in haste and that the erroneous "No" was simply an oversight is not accepted as true. Therefore, it is further concluded that Knox, while acting as agent for Center, knowingly misrepresented when he checked or caused to be checked a "No" response to Question 6. Knox also misrepresented by signing Long's name to the application because Knox thereby falsely represented to the Commission that Jamal Long had prepared or reviewed and signed the application. The motive to so misrepresent was in order to knowingly conceal the fact of criminal convictions from the Commission which, if disclosed, would adversely reflect on Center's character.[26]

99. The evidence presents two theories for attributing the actions of Knox to Center: First, as reflected in Center's renewal application and as reflected in ownership reports, including one that accompanied Center's renewal application, Center held out Knox to the Commission and to the public as its president in January 1990. Second, it is established through the testimony of Knox and Long that Knox was the skilled attorney that Center relied on since its inception to advise, prepare and file materials with the Commission. Knox was also the person who Center relied upon to complete the renewal application and the ownership reports that were filed with the Commission. The evidence establishes that Knox had a major role in the preparation of Center's renewal application, which Center submitted to the Commission, and Knox admitted that he continued to act as a consultant to Center. The relationships between Center, its officers and directors and Charles Knox were such that Knox had full authority to bind Center to his actions on behalf of Center, including the filing of a renewal application which contained the material misrepresentation regarding Knox's criminal record and Question 6.

100. Throughout his testimony, Knox attempted to convince the fact finder that he had resigned before the renewal application was prepared and filed. Knox and Center had a motive to convince the Commission of an effective resignation in 1989 so as to create an appearance that no current officer or director was a felon. Although Knox persisted in his testimony that he had resigned in writing as an officer and as a director in December 1989, a date fortuitously just one month before the renewal application was filed, neither Knox nor Center ever produced the written resignation. If the document existed, certainly it was in the interest of Center to produce it. Its failure to make such a production will be taken as a presumption that the document does not exist.[27] According to Knox, he was replaced by Wayne Ford as Center's president. But Ford's name does not appear on a document as president of Center until January 26, 1990, when he signed a memorandum which reflects that date. However, the renewal application was dated January 22, 1990, which is the date on which it was submitted to the Commission. Nor was Ford produced by Center as a witness to present his version of the facts. Since Ford's testimony would be directly relevant to Knox's account of Knox's involvement in Center's business at and around January 1990, it is presumed that Wayne Ford's testimony would be unfavorable to Center on that factual issue. *Fort Huron Family Radio*, 4 F.C.C. Rcd 2532, 2535 (Review Bd 1989).

Testimony

101. Center presented two witnesses and has vouched for the truthfulness of their testimony: Jamal Long, Center's vice president whose signature appears on Center's renewal application, and Charles Knox who Center represented to be Center's president when the renewal application was

[26] Even convictions based on pleas of *nolo contendere* are considered relevant for the purpose of the Commission's examination of an applicant's character. The convictions of Knox in 1987 and 1989 were pursuant to guilty pleas which are a higher quality of reliability than pleas of *nolo contendere*. *Character Qualifications*, *supra* at 1205-06 n.64. And with respect to motive, the Commission will take cognizance only of non-FCC convictions of persons having a cognizable interest in the licensee or applicant. *Id.* at 1206. Therefore, the incentive to cast Knox as having been severed completely from any control over Center in December 1989 is self-evident from the legal consequence on renewal of Knox's position as Center's principal who is also a convicted felon.

[27] In connection with making this presumption, it is noted that Center did not offer any evidence on the document being lost or misplaced and there was no effort to reconstruct through testimony the method in which any written resignation was submitted, received and filed in Center's business records.

filed. Long testified that he prepared and signed the renewal application as vice president. (Long, Tr. 997.) Knox testified that he prepared the application and that he signed Longs' name to the document. (Knox, Tr. 1415.) One of the two is not telling the truth. Both were principals of Center when the renewal application was filed in January 1990. As explicated above, there was a motive for Knox to have signed Long's name if Knox was successful in convincing the Commission that he had resigned in December 1989. It is concluded that neither Long nor Knox were truthful in their testimony. Long had misrepresented that he had prepared the renewal application and that he had signed his name. The facts establish that Knox, who was much more experienced with Commission paperwork, had prepared the renewal application form and had signed Long's name. In those two respects, Knox testified truthfully. But he had misrepresented in his testimony the status of his resignation in order to avoid an adverse finding against Center with respect to Knox's convictions. In that way, Knox also testified falsely in the hearing. Knox also falsely represented on Center's renewal application the veracity of Jamal Long's signature.

102. Long also attempted by his false testimony to create an appearance that Knox had withdrawn from his position as director and officer of Center. Long testified that Knox was not on Center's board of directors when two ownership reports were filed on May 1987 and in April 1988 which reflected that Knox was a director and president. But Knox testified that he was active in Center's affairs in those years. Long's testimony in conclusory terms that Knox had resigned requires the conclusion that Mr. Long misrepresented the fact of Knox's resignation to the Commission in open court. Long had the motive to lie about Knox's status because if he could convince the fact finder that Knox had resigned in 1989, there would not have been a false negative answer to Question 6. Mr. Samad also testified falsely that the board of directors decided in 1989 to remove Knox. Para. 53, *supra*. It also is concluded that Long and Samad, both station managers, testified falsely that they had no knowledge of Knox's convictions until after January 1990. Paras. 56-57, *supra*.

103. The Commission has the authority to deny a license for an intentional misrepresentation. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). Therefore, the renewal application may be denied because Center intentionally disclosed falsely that Knox had not received felony convictions in 1987 and in 1989. *Id.* The continuing testimony of Knox and Long that the application was prepared in haste does not alter Center's affirmative duty to take precautions to insure that all information that is supplied to the Commission is accurate. *Milton Broadcasting Co.*, 34 F.C.C. 2d 1036, 1047 (Comm'n 1972). The fact that the misrepresentation in Question 6 was intentional rather than a rushed mistake is further established by the continuing misrepresentations in the testimony of Long and Knox and the disingenuous scheme of having Knox sign Long's name as part of the misrepresentation. An applicant may be disqualified on the basis of its principals' candorless testimony in open court and the issue need not be specifically designated as a hearing issue because "truth and candor are always in issue." *Old Time Religion Hour, Inc.*, 95 F.C.C. 2d 713, 719 (Review Bd 1983), citing *RKO General, Inc.*, v. *F.C.C.*, 670 F.2d 215, 234 (D.C. Cir. 1981). Certainly, the affirmative misrepresentation in the renewal application when considered with the additional misrepresentations of the principals at the hearing, makes an even stronger case for denying Center's renewal. The Commission has stated that the "fundamental purpose" for a character inquiry at renewal is:

> to make predictive judgments relating to an applicant's propensity to deal honestly with the Commission and to comply with our rules and policies.

Character Qualifications, supra at 1232. Center has shown through its filing of a renewal application with a material misrepresentation and through the false testimony of its principals, Long and Knox, that it does not have a propensity to deal honestly with the Commission. Rather, it has a propensity to deal falsely with the Commission, even under oath.

Unauthorized Prolonged Silence

104. The facts establish that Center was silent, i.e., KUCB-FM was off-the-air and was not broadcasting continuously for a period of approximately two years between 1987 and 1989. *See* Para. 35, *supra*. There is no evidence that Center shared its frequency's use as it was required to do when it failed to broadcast 12 hours each day over that period of silence in violation of the Commission's rules.[28] There was no evidence that Center had sought or received a Commission approval for all or any significant part of KUCB's silence, or that Center had ever notified the Commission of its extended silence. *See* Paras. 37-38, *supra*. There were several nonspecific references to telephone conversations with Commission staff. But there can be no conclusion drawn from such evidence that KUCB gave the required notice. *See Para* 37, *supra*. There is no excuse for holding a broadcast license in ignorance of a Commission rule to effect its shared time and, therefore, Center was in violation of §73.561 during the period 1987-1989.

105. Of equal significance, Center's agents were regularly concealing KUCB's silence by stating to the Commission that "bleeding" problems were causing the station to leave the air for short periods of time. But Center admitted that in order to have a "bleeding" problem a station must be on-the-air. *See* Para. 40, *supra*. Center was bold in asserting to the Commission that "bleeding" was causing it to be off-the-air for two years and there resulted a serious violation of the following Commission rule:

> In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraphs (a) and (b) of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the Commission, Provided, That notification is sent to the Commission in Washington, DC no later than

[28] The relevant rule provides in pertinent part that noncommercial educational broadcast stations must operate at least 36 hours per week. But where such a station does not operate for a minimum of 12 hours each day, it is required to share the frequency's use subject to a share time arrangement. 47 C.F.R. §73.561.

> the 10th day of limited or discontinued operation. During such period, the permittee or licensee shall continue to adhere to the requirements of the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30-day period, the permittee or licensee will so notify the Commission in Washington, DC, of this date. If the causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, DC, no later than the 30th day for such additional time as may be deemed necessary.

47 C.F.R §73.561(d).

106. Center never complied with that rule. And in the midst of the two year silence period, on November 23, 1988, the Commission staff sent Center a letter which shows that the Commission staff had attempted six times, without success, to contact Mr. Long for information on Center's request to remain silent for only 120 days. *See* Para. 40, *supra*. In that letter, the Commission requested a detailed explanation. Center merely responded in a brief letter that the "problems" had been "corrected. *Id.* Yet at that time the evidence shows that KUCB was without an antenna, leaks at the station caused rain damage which in turn caused a cable to malfunction, and the trailer in which the transmitter was housed was unlawfully taken. And there is no evidence that Center attempted to timely obtain a replacement so that it could stay on-the-air. *See* Paras. 33-36, *supra*.

107. There was no evidence offered by Center which establishes that a formal request was made to the Commission to remain silent for a period longer than 120 days, and there was no request for a two years' silence. The rule requires that notification of a silence be "sent" to the Commission which implies a timely notification in writing. Also, notifications must be "sent" to Washington, D.C. and not to a Commission field office. None of these requirements were met. Such record evidence establishes that Center wilfully violated the Commission's rule against unauthorized periods of silence.[29] The extent of the silence, i.e., two years, warrants a denial of Center's renewal. *Cf. Brown Communications*, 7 F.C.C. Rcd 7221 (Admin. L.J. 1992) (license revoked for unauthorized silence).[30]

Ineptness For "Technical" Violations

108. The ineptness issue involves five admitted "technical" violations of the Commission's rules which when taken individually would not warrant a serious sanction. Each of the violations has been admitted by Center and these include: (a) a failure to timely apply for a license after it expired; (b) the unavailability of equipment performance measurements; (c) a failure to provide a remote control capability; (d) a failure to comply with requirements of the Emergency Broadcast System; and (e) a failure to have a licensed operator on duty. *See* Para. 24, *supra*. In addition, there are instances shown by evidence of record that Center failed to respond to multiple requests by Commission staff for a report concerning: the station's transmitter power output in 1987 and 1988 (Para. 25); the failure found at the station to operate on an authorized frequency, the failure to maintain a public inspection file; and the failure to post the station's construction permit (Para. 26). Continuing similar violations were found to exist during a later inspection in 1986 (Para. 28) and again in 1991 (Para. 31.) The Bureau also notes that Center filed late its renewal application on January 22, 1990, and also failed to file the sufficient number of copies. *See* Para. 32, *supra*.

109. To counter this list of "technical" violations aligned against Center, there is evidence offered by the Bureau of a detailed letter from Center dated July 31, 1987, that is responsive to a Commission staff letter of inquiry dated March 27, 1987. *See* Para. 30, *supra*. While Center's reply was not timely, there was attached to Center's letter an eleven point response to the Commission's letter. *See Paras.* 29-30, *supra*. It addressed the Commission's concerns regarding remote control, etc. and supporting documents were included. *See* Para. 30, *supra*. Such evidence is substantial to rebut a request for denial based an ineptness. In addition, the Commission found no violations at its latest inspection conducted on March 18, 1991. *See* Para. 32, *supra*.

110. The Bureau relies on the case of *The Heart of Black Hills Stations*, 32 F.C.C. 2d 196 (Comm'n 1971). That case involved a denial of the renewal of a TV station's license where during a two year period there were found to have been 56 infractions of 33 separate rule violations and the net effect of the "technical" violations was to deprive the public of a viewable picture. *Id.* at 198 n.3. The evidence in that case included a petition signed by 2,000 viewers concerning the poor picture quality being broadcast. *Id.* at 198-99. Of greatest significance, the Commission staff had outlined a series of problems to be addressed and when the time came for the last inspection before the hearing, the renewal applicant was still found to be in substantial noncompliance. *Id.* at 199. In that case there was a clear nexus shown between a record of nearly 10 years of "technical" violations and the failure to provide an adequate broadcast signal. *Id.* at 199-200. There is no similar nexus shown here. *Cf. Seven League Productions, Inc.*, 8 Radio Reg. 2d (P&F) 271 (Review Bd 1966) (no ineptness issue added where renewal application was filed late, deficiencies were noted in station logs and applicant operated station beyond authorized hours).

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[29] In reaching this conclusion of law, the Presiding Judge considered the evidence in mitigation or extenuation that Center introduced at the hearing. *See* Paras. 42-46, *supra*. There appears to have been an inadequate engineering staff to handle the myriad of engineering problems besetting KUCB-FM. There was also a lack of funds to pay for technical assistance. An initial building was condemned, there was a move, and a trailer containing the transmitter was misappropriated. But none of these problems alone or in the cumulative are related to failures to seek and obtain Commission authorization or to notify the Commission by mail of the silence. Rather, Center merely used telephone calls to Commission regional installations in an effort to give an appearance of meaningful attendance to "bleeding" problems. But the record does not support a conclusion that Center had mitigated the violations.

[30] While there has been a recent offer of assistance from a technical source, the proffer is too late to avoid such a lengthy unauthorized silence. (*See* rejected Center Exh. 105: ltr. dtd. February 28, 1992 from Charles C. Edwards, Jr. to the Presiding Judge).

111. The Bureau also relies on *Beamon Advertising, Inc.*, 1 Radio Reg. 2d (P&F) 285, 289 (Review Bd 1963). In that case, the Review Board added an issue based on general principles of law such as "the Commission cannot condone a pattern of carelessness." *Id.* Also, that case involved an applicant for a new FM facility. It was not a renewal case. *Cf. The Heart of Black Hills Stations, supra* at 199 (the "Commission is normally reluctant to deny renewal of a broadcast license solely for violations of its technical rules").

112. The renewal application of Center is being denied in part because, *inter alia*, it caused KUCB-FM to go silent for almost two years without seeking Commission authorization and without giving notice. And at no time did the Commission authorize any substantial silence period. That is the nature of the significant violations that the Commission addressed in *Black Hills Stations*. Here, there is a specific rule to apply against Center as a renewal applicant. *See* 47 C.F.R. §73.561, *supra*. It would be redundant to add on "technical" violations some of which, to a degree, Center addressed in its letter of July 31, 1987, and again at the Commission inspection of March 18, 1991, wherein no violations were found. Therefore, there are no adverse conclusions made against Center for ineptness in its violations of the "technical" rules.

Unauthorized Transfer Of Control

113. Section 310(d) of the Communications Act of 1934, as amended, prohibits the transfer of control of any corporation that holds a broadcast license without prior Commission approval. The Act does not define "control," and a court has noted that "[d]etermining issues of control . . . is a complex task which must be done on a case-by-case basis." *Storer Communications, Inc.* v. *F.C.C.*, 763 F.2d 436, 442 (D.C. Cir. 1985).

114. Center is a nonstock corporation which operates as a membership organization in which members select officers and directors who control the entity's business. Under such a structure, ultimate control is in the members. Center's articles of incorporation specifically provide for voting members who select the directors by vote. (Center Exh. 7 at 4.) The members are persons who subscribe to the purposes of the corporation (humanization of community, improvement of conditions of the Black oppressed, project positive images of parenthood and other charitable purposes). (Center Exh. 7 at 1-3.)

115. The Commission has found that the actual control of a membership organization resides in the governing board which in this case would be Center's board of directors. *See Transfer Of Control Of Certain Licensed Non-Stock Entities*, 4 F.C.C. Rcd 3403, 3405 (Comm'n 1989). The Commission has adopted the policy that "gradual changes" in the governing board of a membership organization is not a transfer of control so long as a majority of directors are not replaced at one time. *Id.* at 3405.

116. The evidence in this case establishes that in practice the officers and directors of Center controlled the selection of new directors. Para. 70, *supra*. There were initially nine directors when Center filed in 1978. Para. 59, *supra*. The next ownership report, which was not filed until 1987, reflected no directors because Center's vice president mistakenly believed that only officers need be reported. Para. 60, *supra*. The following year, 1988, Center filed a report which reflected two directors and four officers who were not identified as board members. *See* Para. 61, *supra*. In January 1990, a report was filed which identified the same four officers as directors (Dr. Knox - president; Ms. Peavy-Thomas - vice president; Mr. Samad - vice president; Mr. Long - vice president; and Ms. Lincoln - treasurer). Para. 62, *supra*. In March 1990, a report was filed that disclosed Mr. Ford as president in place of Dr. Knox but which failed to list any directors. The testimony of Mr. Samad established that there were four directors aside from officers. Para. 63, *supra*.

117. While the makeup of the officers and directors at various times were reconstructed in the record as outlined above, it cannot be determined how many members there were at the various times who were not also officers or directors. The evidence does establish that from 1978 to 1990, there was a complete turnover of officers and directors except for Mr. Long. However, the hiatus in reporting directors from 1978 to 1988, makes it impossible to determine whether there were gradual shifts of control of the members of the board of directors. It is concluded, however, that of the eleven board members reported in 1992, only three were members in 1979: Jamal Long, Harry Ceaser and Mary Lincoln.

118. There is no evidence offered of a dramatic "coup" or of an embattled takeover. And without evidence sufficient to prove an identity of persons between the members at large and officers and directors, it cannot be determined by a reasoned decision that there was or was not a shift of voting membership control between 1978 and 1990. The Presiding Judge has carefully considered the proposed findings and conclusions for some guidance but has found none that would resolve this absence of evidence. Turning then to the law, the case of *Storer Communications, supra* is cited by the Bureau and by Center. In that case, there was a change in a licensee's directors pursuant to a proxy fight and a new slate of directors took over. But there was no change in control of the ultimate voters, i.e., the shareholders. The question in *Storer*, as in this case, was whether the change in directors was a transfer of control within §310(d) of the Act. The Commission held that the election of a new board of directors would constitute a cognizable transfer of control requiring prior Commission approval pursuant to §310(d). 763 F.2d at 440. However, the Commission also found there was no "substantial change" in control requiring utilization of the "long form" application procedure because the voting base, i.e., the stockholders, had remained constant. *Id.* The court upheld the Commission and held that the Commission had acted within its regulatory discretion even to the point that it adopted a modified short form procedure in the course of the litigation. *Id.* at 442 (the Commission may adopt reasonable classifications of applications on a case-by-case basis).

119. The court noted in its 1985 decision that the case presented the Commission with a "question of first impression." 763 F.2d at 439. Thus the state of the law which would generally bind licensees such as Center was in a state of flux as of 1985. It was that year that a federal court of appeals, for the first time, had to consider whether the imposition of a new board of directors was a transfer of control for the narrow regulatory purpose of requiring sufficient notice to the Commission on the appropriate form. The Court also noted in its decision, without amplification, the standard that would guide Center:

> Directors may also change on an evolutionary basis, e.g., several directors may retire or resign over the course of a year. The Commission only requires that

> such evolutionary changes be reported on an annual Ownership Report. *See* 47 C.F.R. §73.3615 [Ownership Reports].

763 F.2d at 442. Here, Center is charged with a possible violation of §310(d) of the Act which requires an application. Yet, as of 1985, the only requirement which Center had under the law based on the holdings of *Storer Communications* was to disclose changes in directors on ownership reports under a totally different reporting scheme. *See* 47 C.F.R. §73.3615 (1991). It seems that Center was attempting, albeit without complete success, to comply with the law in its five ownership reports filed between 1978 and 1991. Whether or not the ownership reports were adequate disclosures under §73.3615 is not relevant to a charge of a violation of §310(d).

120. After 1985, the Commission addressed in a rule making proceeding the appropriate guidelines for transfers of control of licensed non-stock entities. *See Transfer Of Control, supra*, 4 F.C.C. Rcd 3403 (Comm'n 1989). The Commission's analysis was released on April 11, 1989, wherein the Commission observed:

> Although we have established a general framework for addressing these matters in connection with "traditional" stock corporations, *we presently lack a comparably articulated Commission policy* for determining when a transfer of control of a non-stock entity has occurred.

Id. (Emphasis added.) Thus, until the Spring of 1989, Center had no comparable articulated Commission policy for guidance in conforming with a complex legal reporting requirement under §310(d). *See Storer Communications, supra* at 442 ("control" for reporting purposes under §310 is a "complex task"). By 1990, Center had filed two ownership reports. Under the circumstances, Center is found not to have violated §310(d) of the Communications Act.[31] If Center had failed to file adequate ownership reports it was as a result of mistake or negligence because the record evidence does not prove any intent to deceive the Commission about Center's ownership. And the Commission has held that the bare existence of mistake without a showing of deceptive intent does not constitute disqualifying conduct. *Ramon Rodriguez and Associates, Inc.*, 7 F.C.C. Rcd 2633 (Comm'n 1992).[32]

Acorn's Financial Qualifications

121. Acorn was assigned the burden of proceeding and the burden of proof on the added financial qualification issue. *See* Para. 4, *supra* and Presiding Judge's ruling in *Order* FCC 91M-3004, released October 3, 1991. *See also Texas Communications Ltd. Partnership*, 6 F.C.C. Rcd 1260 (Review Bd 1991) (burden of proving its financial qualifications in a timely fashion at hearing is on the applicant), *review denied*, 6 F.C.C. Rcd 5191 (Comm'n 1991).

122. Acorn had certified "No" to the financial certification section of its application. Acorn filed an amendment certifying "Yes" on September 20, 1991, which was accepted on a determination of "good cause" over Minority's objection. The Bureau supported the amendment in a Comment[33] while recognizing that a financial issue should have been set against Acorn in the *HDO*. (Tr. 65.) Acorn's amendment sought to show that it was financially qualified through the bank (UST) letter. The Bureau argued that good cause for the delay was shown. (Tr. 73.) However, the Bureau asked that a financial issue be added to determine at hearing the adequacy of Acorn's financial proposal. (Tr. 72.)

123. The proposal of Acorn to finance through a UST commitment letter to a third party, AMFM, is deficient as a matter of fact and it is rejected as a method for providing any reasonable assurance. First, there is noted a fundamental error in the amount of funds that were considered to be required. The tri-partied letter was grounded on an erroneous assumption that Acorn would require $700,000 to construct and operate. *See* Para. 89, *supra*. Evidently, the true estimate would have been approximately $150,000. AMFM and UST had apparently confused the Acorn-AMFM situation with an unrelated TV proposal that would have been considerably more costly. AMFM and UST had shown a routine treatment of the issue and did not involve Acorn in the process. If Acorn had been consulted (or even Acorn's parent ANBN) before the UST letter was issued, the clearly erroneous $700,000 "estimate" might have been detected. But there was no relationship between Acorn and UST and therefore there was never a meeting of the minds on a true estimate of costs. The UST/AMFM letters were therefore meaningless.

124. Acorn's self-serving conclusory arguments that it now has a source of adequate funding is rejected. In order to establish its financial qualifications, an applicant must in fact have "reasonable assurance" of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed facility for three months without revenue. *Scioto Broadcasters Limited Partnership*, 5 F.C.C. Rcd 5155 (Comm'n 1990); *JAM Communication, Inc.*, 4 F.C.C. Rcd 3754 (Comm'n 1989). Acorn changed its financial certification to a "yes" based on a

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[31] The Presiding Judge also considered a case cited by Center, *LNI Broadcasting Corp.*, 17 F.C.C. 2d 288-89 (Comm'n 1968). However, that case involved seeking a no action letter from the Commission on a transfer of less than 5% voting stock and is not applicable here.

[32] It is also noted that Center argues that it had no intent to deceive the Commission with respect to control. *See* Center's PFC at 36. And the Bureau concedes that there is insufficient evidence to support a finding of intentional misrepresentations in Center's ownership reports. *See* Bureau's PFC at 47.

[33] The Bureau noted in its Comment that Acorn had attempted to secure financing since filing its application and that it was not successful in its attempts until July 1990. The amendment was not sought at that time because Acorn was without counsel. The Bureau argued that good cause had been shown, although the Bureau consistently argued that Acorn's financing scheme was inadequate as a matter of law. The Presiding Judge authorized Acorn to proceed with an amendment that was filed by a successor attorney because, under the circumstances, Acorn had acted diligently with its new counsel in submitting the AMFM and UST proposals and Acorn qualified for a "good cause" amendment on September 20, 1991. *Cf. Bison City TV 49 Limited Partnership*, 91 F.C.C. 2d (Review Bd 1982) (applicant unable to initially certify but was permitted upon a "good cause" showing to amend nine months after designation of financial issue against it).

letter dated December 27, 1989 from AMFM addressed to Acorn which confirmed only a "willingness" to secure funding in the amount of $700,000. Acorn also relied on a letter dated July 20, 1990, from UST to AMFM setting forth conditions that neutralize any commitment. *See* Paras. 81-82, *supra*. UST is not in privity with Acorn; UST officers never met with an Acorn principal to review finances or a business plan for the proposal; and UST conditionally commits to provide funding only so long as AMFM continues to be involved in the management of Acorn's station even though AMFM is not a party to the application. Even if AMFM could participate actively as a consultant, there is no guarantee that the relationship will continue. And the conditions to UST's loan are substantial: UST must first obtain prior approval from participating potential investors who will actually fund the project. There is no relationship between Acorn and any of the investors and there is no evidence that any investor has seen Acorn's financial statement or a plan of operations which discloses experience of operating personnel and a feasibility of performance. And not one of the potential investors has expressed a willingness to participate. Finally, the disproportionately overestimated loan of $700,000, admittedly an estimate based on an unrelated project, shows the UST letter to be ephemeral. No reasonable applicant could rely on the AMFM/UST letters for a reasonable assurance of funding to construct and operate for three months without a source of revenue.

125. In a narrower context, Acorn represents that it is relying on UST for a "bank letter." It has been held that where an applicant is relying on a bank, the applicant must show:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc.* v. *F.C.C.*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 F.C.C. 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms).

Scotio Broadcasters, 5 F.C.C. Rcd 5158, 5160 (Review Bd 1990). None of these conditions for relying on a "bank letter" come close to being met here because Acorn was never in contact with UST. In fact, the ultimate lenders who must give their individual approval are the "investment management clients" of UST who have not yet given their consents. Those persons have no knowledge of Acorn at this time and Acorn must meet the "credit criteria" of UST to the then satisfaction of its lending clients as a precondition to the loan commitment. *See* Paras. 82-83, *supra*.

126. It has been held that the mere discussion of a possibility of bank financing with bank officials does not constitute a reasonable assurance of financing. *Marlin Broadcasting of Central Florida*, 5 F.C.C. Rcd 5751 (Comm'n 1990). In this case, Acorn did not itself even reach the point of ever discussing a loan with an official of the "bank" that would be the source of the loan, nor with any of the bank's "investment management clients." *Cf. John D. Bomberger*, 7 F.C.C. Rcd 5516, 5520 (Review Bd 1992) (bank letter rejected for failure to reflect a present firm intention to make loan to the applicant and letter was found to be an accommodation where there was no prior relationship shown and there was only a brief meeting before the letter was issued). Therefore, it is concluded as a matter of law that Acorn has failed to meet the criteria for relying on a "bank letter" as a reasonable assurance of its financial ability.[34] Nor has Acorn any alternate means of showing reasonable assurance such as self-financing. As a result of Acorn failing to meet its burden of proof to show that it is financially qualified to construct and operate, Acorn is found to be unqualified to be comparatively considered for a construction permit in this case.

Recent Decisional Law

127. This case is also distinguished on the facts from the Commission's recent decision on financial qualification in *Welch Communications, Inc.*, 8 F.C.C. Rcd _____, Comm'n *Slip Op.* FCC 93-78, released February 28, 1993. In that case, a minority applicant had not furnished a business plan to Broadcap, its lending source. The Commission held that a business plan was not needed because Broadcap conducted its own market analyses. But there is no evidence in this case showing that UST or its clients conduct their own market analyses. AMFM reviewed an Acorn business plan but AMFM was only an intermediary between Acorn and UST, not a source. There was privity between Welch and Broadcap but none between Acorn and UST. And there is no evidence that UST was shown or provided with an Acorn business plan by ANBN or by AMFM.

128. Also, in the *Welch* case, the applicant met personally with a Broadcap principal and he "explained his proposal" that would require a loan ranging from $175,000 to $200,000. *Id.* at Para. 11. There was no meeting between a principal of Acorn and an officer or employee of UST. Nor was there any meeting between a principal of Acorn and a client investor. And, in this case, the only consideration to specific funding was between Acorn's parent company ANBN and AMFM which erroneously referred to a wholly irrelevant TV proposal that would cost between $700,000 and $730,000. Therefore, no relevant comparable costs were considered by AMFM or by UST or by its clients.

129. Finally, in *Welch Communications*, the Commission found that "no further steps were required on the part of Welch to insure Broadcap's participation in the venture." *Id.* at Para. 12. Here, Acorn would ultimately need to

[34] There is not even evidence in the record that UST examined Acorn's financial statements to see if the "investment criteria" of UST and its investment clients might be met. While the evidence does not support the intentional creation of an "accommodation" letter, the letter from UST dated July 2, 1990, has the same characteristics of unreliability as an "accommodation" letter. *Cf. John D. Bomberger, supra.*

convince individual clients of UST to invest or to loan substantial sums of money which leaves many "further steps" for Acorn to complete. Therefore, the recent Commission decision of *Welch Communications, supra,* does not alter the legal conclusions reached above as to Acorn's lack of a present reasonable assurance of a financial ability to construct and operate a radio station.

130. Assuming *arguendo* that a "reasonable assurance" of AMFM could be adopted by Acorn under a theory of third-party beneficiary, it is concluded that even AMFM has no reasonable assurance of funding from UST. UST relies on unidentified investment clients who will require AMFM to manage the station as a condition to funding. The record reflects no source of funding other than UST for AMFM to provide funds to Acorn or to its parent company ANBN. AMFM has no reasonable assurance of funds from UST because AMFM is not a proposed station manager. The local members of Acorn, who have no direct negotiating relationship with UST, have an even lesser reasonable assurance. *Cf. Salt City Communications, Inc.*, 8 F.C.C. Rcd _____, Comm'n *Slip Op.* FCC 93-48, released January 29, 1993 (established MESBIC can extend a reasonable assurance beyond its lending limits when MESBIC has successful record of meeting past commitments and there is no evidence that undermines MESBIC's business judgment). In that case, MESBIC [minority enterprise small business investment company] dealt directly with the applicant. And in that case, there was no issue about the accuracy of estimated costs related to the amount of the loan. Here, in contrast, Acorn did not deal directly with the ultimate lender UST and its clients, and there was a material mistake of fact in the estimated costs and in the amount of the contemplated loan [$700,000] for which Acorn believed that it required a reasonable assurance. Also, the president of the MESBIC in *Salt City* had personally and independently investigated the relevant radio market, reviewed the business plan, and became familiar with the background of the principals before making a commitment of assurance. Here, there is no evidence that UST has acted similarly to gain first-hand knowledge of Acorn's proposal.[35]

131. In addition, the lender-facilitator MESBIC planned to contact two or three additional lenders which also were established MESBIC institutions. By contrast, AMFM as Acorn's facilitator has arranged for UST to contact undisclosed "investment management clients" which may or may not be established institutions. The record does not disclose their identity and qualifications.[36] Finally, UST contemplates "requiring a pledge of the stock of [ANBN]" which is the sole stockholder of the applicant Acorn and its controlling parent company. Such a requirement of the voting stock of the parent company of the applicant would result in UST acquiring numerical control over the applicant while there was an obligation to repay a loan. That transaction would be in violation of the Commission's policy against the unauthorized transfer of a numerically controlling block of voting stock. *See* rulemaking on *Transfer Of Control, supra,* 4 F.C.C. Rcd 3403 (Comm'n 1989).

Minority Communications, Inc.

132. There is substantial evidence in the record to conclude that Minority is basically qualified to receive a construction permit for a noncommercial FM station in Des Moines. Mr. Nevilles is proposed to work full time as Minority's general manager. He was an assistant manager to KUCB-FM. He also has considerable experience as a radio announcer. Center itself has acknowledged Nevilles' experience. *See* Center's PFC at 16 (Nevilles served at KUCB during 1982-1987 in capacities of announcer and assistant manager). Minority also has presented evidence of its specific educational objectives. *See* Para. 17, *supra.* Types of programs are described (*e.g.*, employment, medical, political and Black community relations) which are proposed to be broadcast in cooperation with educational institutions. Minority will utilize professionals from schools and colleges in presenting information on technical education and job-related training. (*Id.* and Minority Exh. 3 at 4-9.) And Minority has defined the programming that it will integrate into its operations which meet its stated objectives of community improvement and education. Therefore, Minority has presented substantial evidence proving that it can feasibly implement its proposal.

133. But Center and Acorn have questioned Mr. Nevilles' credibility in his testimony. Those questions are important and will be fully considered. *See Old Time Religion Hour, Inc., supra* (truth and candor in testimony are always in issue). It is noted that at one point Center cited Nevilles' testimony in support of an affirmative finding that Station KUCB-FM went off-the-air for a lack of funds. *See* Center's PFC at 16. Center and Acorn, however, consider Nevilles to be untruthful because of an apparent conflict in his written and oral testimony. *See* Center's PFC at 16 and Acorn's PFC at 10-11. The sworn written statement which was received in evidence at the admission session stated in part that:

> [Nevilles] acted as assistant manager at KUCB, doing program planning and supervision of on-the-air staff (1985-87).

(Minority Exh. 6.) At the hearing, Mr. Nevilles stated at one point in his testimony of one hundred and fifty four pages that his "basic duties" were to make sure that "people showed up." (Nevilles, Tr. 643, 712.) Minority considers it an "equivocation" when Nevilles' testimony in other places showed him to be an "assistant manager on a daily basis." (Nevilles, Tr. 724.) Minority even suggests that Nevilles deliberately attempted to downplay his role at KUCB because so many problems had occurred on his watch. *See* Acorn's PFC at 32. Center notes a more readily

[35] It is recognized that *Salt City* involved a commercial station which would call for a business plan that would project a commercial success. As a noncommercial broadcaster, Acorn would need to show UST and its clients a plan reflecting a proficiency in broadcasting and programming that would meet community needs as well as the feasibility of effecting its proposal.

[36] The Bureau sought voluntary disclosure of the identity of the "investment management clients" but UST refused such disclosure on "ethical" considerations under a code of ethics adopted by the profession in which UST is engaged. (Acorn Exh. 3 Att. D.) There was no compulsory discovery sought for the information under the Commission's discovery rules.

measured inconsistency between Nevilles' written testimony concerning his two years' of supervisory work at KUCB (1985-87) and his testimony of a five year tenure at the station (1982-87). *See* Center's PFC at 56 and Nevilles, Tr. 656. Center also seeks to raise the inference that most of the problems which caused KUCB to leave the air had occurred on Nevilles' watch. *See* Center's PFC at 57-58 (Nevilles was the only witness to testify to knowledge of a recording on-the-air for Knox's defense fund and Nevilles' testimony was "riddled with inconsistencies").[37]

134. There is no basis for rejecting Nevilles' testimony or for concluding that Nevilles lacked candor or dissembled in his testimony. Nevilles was careless in his written testimony for failing to accurately disclose his five year association with Center and KUCB. However, mere "carelessness" does not disqualify. *See In re Application of John C. Roach*, 43 F.C.C. 2d 685 (Comm'n 1973). And there is no assertion that the totality of Nevilles' testimony on any material issue of fact was untruthful. By comparison, Knox affirmatively falsified the identity of the person who prepared and signed Center's renewal application and Knox affirmatively testified with a lack of candor with respect to his resignation for the purpose of avoiding the legal consequence of his criminal convictions. Center also relies on Dr. Knox for establishing through Knox's testimony that Nevilles had at one time served on Center's board of directors for a "short period of time." (Center's PFC at 56; Knox, Tr. 1382.) Yet none of the ownership reports filed with the Commission, some of which were prepared by Knox, show Nevilles to have been a director.

135. There is no basis in this record to find that Mr. Nevilles intentionally testified in an untruthful manner with an intention to mislead the Commission. *See* in general *62 Broadcasting Inc.*, 4 F.C.C. Rcd 1768, 1774 (Review Bd 1989). *Compare Rebecca L. Boedker*, 5 F.C.C. Rcd 2855, 2860 (Review Bd 1990) (failure to report accurately the status of a qualifying loan held to be a lack of candor of "blatant and unacceptable dimension"). The relatively minor and careless misstatements of Nevilles do not substantiate a disqualifying lack of candor. Therefore, the conclusion that Minority is basically qualified to receive the grant is not adversely effected by Nevilles' testimony.

Summary Conclusions

136. Before there is a requirement to comparatively assess the three competing applicants, it is appropriate to first decide the basic qualifying issues against Center and Acorn. *See Guinan, et al.* v. *F.C.C., supra.* Since substantial evidence of record shows that both applicants are disqualified under the applicable evidentiary standard,[38] there will not be a full comparison made of the three applicants[39] and the grant will be made to Minority, the only qualified applicant. *See Colonial Communications, Inc.*, 6 F.C.C. Rcd 2296 (Comm'n 1991), *recon. dismissed*, 7 F.C.C. Rcd 674 (Comm'n 1992) ("an agency, like a court, need not decide questions which are not relevant to its decisions"). *Cf. John D. Bomberger, supra* at 5520.

137. The Commission alleged qualifying issues against Center concerning ineptness, minimum hours of operating without a time share arrangement and unauthorized silences, misrepresentation on a renewal application form, related misrepresentations concerning ownership and composition of Center during the renewal term, and whether there was an unauthorized transfer of control and misrepresentations of the constituent officers and directors. *See* Para. 2, *supra.* Center was permitted to offer rebuttal evidence to the charges.

138. The Presiding Judge has found that Center would not be disqualified for its ineptness or for any unauthorized transfer of control or for its deficiencies in accurately disclosing the officers and directors to the Commission in periodic ownership reports. However, Center was found to have wilfully intended to deceive the Commission by responding "No" to Question 6 of the renewal application regarding Charles Knox's felony convictions and to have falsely testified about Center's knowledge of Knox's convictions in January 1990 when the Renewal application was filed, about the resignation of Knox as an officer before January 1990, and about the accuracy of Long's signature and certification on a Commission renewal application. Therefore, under the Commission's *Character Qualifications Policy, supra,* Center is found to be not qualified to hold a Commission license because Center is found to have been untruthful in material disclosures to the Commission and therefore cannot be trusted to be truthful in dealing with the Commission in the future. *See Normandy Broadcasting Corp.*, 8 F.C.C. Rcd 1 (Admin. L.J. 1992).

139. As a second basis for disqualification, Center is found to have unlawfully caused Station KUCB-FM to remain off-the-air for a period of two years without Commission knowledge or authorization. Such unauthorized silence for a two year period of time is an independent basis for disqualifying Center to hold a Commission license for Station KUCB-FM. When that incident of prolonged unauthorized silence is considered along with the character deficiencies found in the renewal application and in the testimony of Center's principals, the decision to deny Center's renewal is not offset by any or all of the mitigating circumstances cited by Center. *See Brown Communications, supra.*

140. Acorn was found to be unqualified because it based the certification of its financial ability on a letter from a financial institution to AMFM, a non-party to the application. AMFM relied on the management of Acorn's parent company which was located in New Orleans, Louisiana and which is not a party to Acorn's application. UST relied on the continuing management of the station by a non-applicant party, AMFM. The letters from AMFM and from

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[37] *Compare* Acorn's PFC at 32 (Nevilles authorized playing of tapes to raise funds for Knox's defense).

[38] Center and Acorn have the burden of proving by a preponderance of the evidence that they are qualified to receive a grant. *Telestar, Inc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987). Those two applicants have failed to meet that burden.

[39] It is noted that Acorn would rank behind Minority on signal strength with respect to total coverage and with respect to a new fourth service. *See* Para. 93, *supra.* Together, these comparative merits in a significant category would be difficult for Acorn to overcome on a comparison of programming. *Cf. FBC, Inc.*, 95 F.C.C. 2d 256, 259-62 (Review Bd 1983), *recon. denied*, 96 F.C.C. 2d 976 (Comm'n 1984) (applicant with substantial coverage preference is comparative favorite over applicant having superior integration proposal). *See Channel 32 Broadcasting Company*, 6 F.C.C. Rcd 5188-89 (Comm'n 1991). *See also* fn.24, *supra* (commenting on "other factors").

UST do not reflect any present commitment to loan Acorn funds. Rather, UST only conditionally assures that it will seek funding for AMFM from unspecified clients who would first need to assure themselves individually of Acorn's creditworthiness. There was no evidence of any financial information of Acorn that was considered by the financial institution UST or by its clients who are hoped to be the funding source. Moreover, through admissions of a non-party who had prior experience in arranging for financial backing for noncommercial FM applicants, it was established that the alleged "commitment" of $700,000 was an error. Therefore the $700,000 loan as stated in the "bank letter" was never intended to be a commitment extended to Acorn or to Acorn's parent company. UST also contemplated receiving an unauthorized pledge of control stock of Acorn's parent company as collateral and UST required the active management of the non-party AMFM. It is concluded that Acorn has no reasonable assurance of a loan from UST or from any other entity that would permit it to construct and operate the station for three months. It is also concluded that Acorn is not financially qualified to receive a construction permit for a new noncommercial FM station at Des Moines, Iowa.

141. Since Minority is found to be basically qualified and since there is no other qualified applicant remaining to be comparatively considered, Minority receives the grant by default.

ORDER

Accordingly, IT IS ORDERED that the license renewal application of Center For Study And Application Of Black Economic Development (File No. BRED-900131UA) for Station KUCB-FM, Des Monies, Iowa IS DENIED.

IT IS FURTHER ORDERED that the application of Iowa Acorn Broadcasting Corporation (File No. BPED-900102MB) IS DENIED.

IT IS FURTHER ORDERED that the application of Minority Communications, Inc. (File No. BPED-900116MA) for a Construction Permit for a new FM Station on Channel 207C at Des Moines, Iowa IS GRANTED.[40]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

[40] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-83

In the Matter of

Amendment of Section 73.202(b), RM-8191
Table of Allotments,
FM Broadcast Stations.
(Pocomoke City, Maryland)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 3, 1993; Released: March 24, 1993

Comment Date: May 17, 1993
Reply Comment Date: June 1, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Robert L. Purcell ("petitioner"), seeking the allotment of Channel 223A to Pocomoke City, Maryland, as that community's first local service. Petitioner provided an engineering study in support of the petition and indicated he would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local service to Pocomoke City, Maryland. Channel 223A can be allotted to Pocomoke City, Maryland, consistent with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pocomoke City, Maryland	---	223A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on ore before **May 17, 1993,** and reply comments on or before **June 1, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Robert L. Purcell
15010 Carrolton Road
Rockville, Maryland 20853

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Com-

[1] The coordinates for Channel 223A at Pocomoke City are 38-04-30 and 75-34-12.

mission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-84

In the Matter of

Amendment of Section 73.202(b), RM-8194
Table of Allotments,
FM Broadcast Stations.
(Asbury, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 5, 1993; Released: March 24, 1993

Comment Date: May 17, 1993
Reply Comment Date: June 1, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by William Bruce Watcher ("petitioner"), requesting the substitution of Channel 278C3 for Channel 278A at Asbury, Missouri. Petitioner also requests modification of its construction permit for Station KWXD, Channel 278A, to specify operation on Channel 278C3.[1] Petitioner submitted information in support of the proposal.

2. We believe petitioner's proposal warrants consideration. Channel 278C3 can be allotted to Asbury, Missouri, in compliance with the Commission's spacing requirements at petitioner's specified site.[2] We shall also propose to modify the construction permit for Station KWXD, Channel 278A, to specify operation on Channel 278C3 in accordance with section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 278C3 for Channel 278A at Asbury, Missouri, since it could provide the community with expanded local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Asbury, Missouri	278A	278C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 17, 1993,** and reply comments on or before **June 1, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Lauren A. Colby
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21705-0113

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The construction permit for Station KWXD (BPH-910410MG) was granted on May 11, 1992, and expires on November 11, 1993.
[2] The coordinates for Channel 278C3 at Asbury are 37-23-44 and 94-40-42.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase I

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

Bell Atlantic Telephone Companies
Motion for Extension of Time

ORDER

Adopted: March 9, 1993; Released: March 10, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 3, 1993, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a motion requesting extension, until June 16, 1993, of the deadline for filing Second Supplemental Direct Cases in the above-captioned proceeding. Investigation of Special Access Tariffs of Local Exchange Carriers, Tentative Decision, CC Docket No. 85-166, Phase I, FCC 92-488 (released Feb. 16, 1993) (*Tentative Decision*). Those direct cases are otherwise due on March 16, 1993. On March 5, 1993, similar motions were filed by the Ameritech Operating Companies (Ameritech) and US West Communications, Inc. (US West). Ameritech and US West also request an extension of this deadline to June 16, 1993. No comments or oppositions were filed against these motions.

2. Ameritech, US West, and Bell Atlantic state that while the *Tentative Decision* was pending, all their personnel involved with this proceeding have retired, left the company, or transferred to other positions. These carriers also maintain they must essentially start from scratch in preparing their Second Supplemental Direct Cases. Ameritech Motion at 1-2; US West Motion at 1-2; Bell Atlantic Motion at 1-2.

3. We have reviewed the carriers' motions. It is the policy of the Commission that motions for extension of time shall not be routinely granted. Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a). There has already been substantial delay in this proceeding, in part because the record has not been adequate to resolve all the issues in this investigation. *See Tentative Decision* at para. 147. Accordingly, it is now necessary to resolve this proceeding as early as possible.

4. In light of the need to resolve this proceeding, Ameritech, Bell Atlantic, and US West have not justified a three month extension of the pleading cycle. However, we conclude that the public interest would be served by granting Ameritech, US West, and Bell Atlantic a one month extension of time in which to file its Second Supplemental Direct Case. We also conclude that other interested parties should be granted this same extension. Therefore, the American Telephone and Telegraph Company (AT&T) and all Bell Operating Companies (BOCs) are required to file Second Supplemental Direct Cases no later than **April 16, 1993**. Interested parties may file comments or oppositions to the Second Supplemental Direct Cases no later than **May 17, 1993**, and replies to these comments or oppositions shall be filed no later than **June 17, 1993**.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-522

In the Matter of

Amendment of Section 73.202(b),	RM-7493
Table of Allotments,	RM-7499
FM Broadcast Stations.	
(LaCrosse, Florida and	
Douglas, Georgia)	

ORDER STAYING FILING WINDOW AND EFFECTIVE DATE

Adopted: March 15, 1993; Released: March 16, 1993

By the Chief, Policy and Rules Division:

1. The Commission, on its own motion, stays the opening of the March 19, 1993 to April 19, 1993, filing window for Channel 258A at LaCrosse, Florida, and the effective date for the substitution of Channel 258C for Channel 258C1 at Douglas, Georgia. Both the allotment and filing window were established in the *Report and Order* in this proceeding, 8 FCC Rcd 736 (1993).

2. The *Report and Order* allotted Channel 258A to LaCrosse, substituted Channel 258C for Channel 258C1 at Douglas and amended the license of Station WDMG(FM), Channel 258C1, Douglas, accordingly. Upon further analysis, we have determined that the reference coordinates for the channels are mutually exclusive with each other. Therefore, we are staying the opening of the filing window and the effective date to allow for further consideration of the two proposals.

3. Accordingly, pursuant to Section 1.102(b)(3) of the Commission's Rules, IT IS ORDERED, That the action in the *Report and Order* in this proceeding establishing a March 19, 1993 to April 19, 1993, filing window for the Channel 258A allotment at LaCrosse, Florida, and an effective date of March 18, 1993, for the substitution of Channel 258C for Channel 258C1 at Douglas, Georgia, IS HEREBY STAYED pending further action.

4. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 12, 1993

Global Communications, Inc. files Petition for Declaratory Ruling Regarding the Obligation of Cellular Licensees to Tariff Marine Services

Pleading Cycle Established

COMMENTS: April 16, 1993
REPLY COMMENTS: May 17, 1993

On February 25, 1993, Global Communications, Inc. (Global) petitioned the Commission to issue a declaratory ruling recognizing the legal obligation of celluar telephone carriers to incorporate into tariffs their offering of communications service to ships at sea and to abide by the requirements of the Communications Act.

Global requests that the Commission declare that offers of communications service by cellular telephone companies to or from ships at sea are subject to the requirements of the Communications Act for the filing of tariffs with the Commission, as well as to the substantive requirements of Section 201 and 202 of the Communications Act.

Interested parties should file comments regarding Global's petition no later than **April 16, 1993.** Reply comments should be filed no later than **May 17, 1993.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Pat Nagle, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic	Transmittal Nos.
Telephone Companies	541 and 562
Tariff F.C.C. No. 1	

ORDER

Adopted: March 15, 1993; Released: March 16, 1993

By the Deputy Chief (Policy), Common Carrier Bureau:

1. The Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 541 on December 22, 1993, to introduce a 12-month trial of the Primary Interexchange Carrier (PIC) Switchback Option. The PIC Switchback Option is an arrangement that interexchange carriers (IXCs) can subscribe to that addresses Bell Atlantic's role in, and the IXCs' liability for, end users' complaints that their residential or business long distance service has been changed without authorization. To participate, IXCs must sign up for the service with Bell Atlantic and must submit end users' PIC change orders through a mechanized system for data exchange that uses an industry format. Transmittal No. 541, Description and Justification (D&J) at 1-2.

2. Under this transmittal, when an end user complains to Bell Atlantic that its long distance service has been switched without authorization, Bell Atlantic will switch the end user back to its previous IXC at no charge to the end user and will also credit the end user's account for the change charge assessed for switching PICs. Bell Atlantic would then bill the unwanted IXC, who has elected the PIC Switchback Option, $7.59 per end user.[1]

3. The PIC Switchback Option is basically a "no-fault option," in that Bell Atlantic will not investigate disputed PIC changes involving IXCs participating in this service and will not request that IXCs produce Letters of Authorization (LOAs) -- written proof of end users' authorization to change their long distance service. Bell Atlantic will report to the Commission on a quarterly basis during the 12-month trial as to the number of participating IXCs, the number of switchbacks, and other relevant data. D&J at 1-2 to 1-3. Transmittal Nos. 541 and 562 are scheduled to become effective on March 17, 1993.[2]

4. On January 6, 1993, Allnet Communication Services, Inc. (Allnet) filed a petition to reject Transmittal 541, and American Telephone and Telegraph Company (AT&T) filed a petition to suspend and investigate the transmittal. Bell Atlantic replied to the petitions on January 19, 1993.

5. In its petition, Allnet argues that Transmittal No. 541 should be rejected because it violates Section 61.49(g)(1) of the Commission's Rules, 47 C.F.R. § 61.49(g)(1), which requires that each tariff filing that introduces a new service that will later be included in a price cap basket be accompanied by cost data sufficient to establish that it will generate a net revenue increase. Allnet Petition at 1-2. According to Allnet, Bell Atlantic wrongly claims that the new service is revenue and cost neutral, and that Section 61.49(g)(1) only applies to IXCs, not to local exchange carriers (LECs) such as Bell Atlantic. *Id.* at 2.

6. AT&T urges the Bureau to suspend and investigate Transmittal 541 to prevent IXCs from being deprived of revenues as a result of unauthorized PIC changes. AT&T Petition at 8. Both petitioners contend that the transmittal will encourage unauthorized switching because IXCs will pay only $7.59, in comparison to the unauthorized switching charges of $23.05 allowed under the current tariff. Allnet Petition at 4-5; AT&T Petition at 7.

7. AT&T also argues that Transmittal 541 will upset the balance of the Commission's presubscription dispute resolution process. According to AT&T, because IXCs willing to absorb the nominal charge of the tariff will never be required to support submission of a change order with an end user's LOA, the purpose for requiring IXCs to obtain LOAs to support submission of a PIC change order will be eliminated. AT&T Petition at 6-7. In addition, AT&T asserts that this tariff is in conflict with the *PIC Verification Order*,[3] which explicitly presupposed that the LECs would continue to apply tariffs imposing substantial charges on IXCs for submitting unauthorized PIC changes. *Id.* at 5-6.

8. Bell Atlantic replies that the PIC Switchback Option is entirely consistent with the Commission's orders and policies because it does not relieve IXCs of their obligation to institute steps to obtain LOAs before placing customers' PIC change orders with the LEC. In addition, notes Bell Atlantic, because LECs are not authorized to impose fines or penalties, the unauthorized PIC change charges in its current tariff only serve to recover its costs for investigating a disputed PIC change -- a cost that is not justified under the PIC switchback option where no investigation is performed. Bell Atlantic Reply at 2. According to Bell Atlantic, this option is intended to lower the cost of PIC changes for the LEC and the IXC and to reduce inconvenience to end users from PIC dispute investigations. *Id.* at 3. Finally, Bell Atlantic states that it will include information regarding any IXC abuse of this option in its quarterly report and will not offer the option for renewal if it is found to encourage unauthorized switching. *Id.* at 2.

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[1] Because all PIC change charges are excluded from price cap regulation, the Bureau advised Bell Atlantic to refile its cost support data under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Bell Atlantic subsequently filed Transmittal No. 562 to revise its cost data associated with the $7.59 switchback charge. As revised, this switchback charge includes the revised cost of crediting the customer's account for the original $5.00 PIC change charge, $2.53 for switching the customer back to the previous carrier through the mechanized system for data exchange, and administrative costs. Amended D&J at 1-2 to 1-3, 3-3, 4-1, and Workpaper 9.

[2] Transmittal 562 also contains revised language to clarify the proposed trial offering and advances the effective date from March 22 to March 17, 1993.

[3] Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (*PIC Verification Order*).

9. The Common Carrier Bureau has reviewed the transmittals and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

10. Accordingly, IT IS ORDERED that the petition to reject the Bell Atlantic Companies Tariff F.C.C. No. 1, Transmittal No. 541, filed by Allnet Communication Services, Inc. IS DENIED.

11. IT IS FURTHER ORDERED that the petition to suspend and investigate the Bell Atlantic Companies Tariff F.C.C. No. 1, Transmittal No. 541, filed by American Telephone and Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 11, 1993

NOTICE OF PROPOSED RULEMAKING REGARDING NEW SERVICE REPORTING REQUIREMENTS UNDER PRICE CAP REGULATION

ACTION IN DOCKET CASE: CC DOCKET NO. 92-275

Pleading Cycle Extended

New Comment Date: March 29, 1993
New Reply Comment Date: April 13, 1993

In a Notice of Proposed Rulemaking (NPRM) released January 19, 1993, in the above docket, the Commission proposed to reduce the frequency with which price cap carriers must file certain reports regarding their new interstate services and to otherwise clarify this reporting requirement.[1] By this Public Notice, the Commission extends the due dates for comments and reply comments in response to that NPRM.

Interested parties should file comments regarding the NPRM on or before **March 29, 1993**, and reply comments should be filed on or before **April 13, 1993**. An original and four copies of all such comments and replies must be filed in accordance with Section 1.419(b) of the Commission's Rules, 47 C.F.R. § 1.419(b). In addition, two copies of each pleading must be filed with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Finally, parties should also file one copy of each document with the International Transcription Service, the Commission's duplicating contractor, in Suite 140, 2100 M Street, N.W., Washington, D.C. 20037.

For further information, contact Allen A. Barna, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

[1] New Service Reporting Requirements Under Price Cap Regulation, CC Docket No. 92-275, 8 FCC Rcd 438 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 10, 1993

COMMON CARRIER BUREAU REQUESTS FURTHER INFORMATION CONCERNING ZONE DENSITY PRICING PLANS; EXTENDS COMMENT DATES

COMMENTS DUE: MARCH 26, 1993
REPLY COMMENTS DUE: APRIL 2, 1993

Thirteen Tier 1 Local Exchange Carriers[1] have filed zone density pricing plans with the Common Carrier Bureau pursuant to the Commission's *Expanded Interconnection Order*.[2] On February 24, 1993, the Bureau released a public notice establishing a pleading cycle for parties wishing to comment on those plans.[3] In this public notice, the Bureau is revising the schedule for the filing of comments and reply comments concerning the LECs' zone density pricing plans using the above captioned dates.

The Bureau's examination of the plans that were filed showed that slight to severe deficiencies exist in all of the zone density plans or the supporting documentation. The Bureau has therefore directed the filing LECs to provide additional information needed to evaluate the reasonableness of the plans. All LECs that filed zone density pricing plans are to provide the information in supplemental filings. These filings are to be headed "Supplemental Filing in Support of XYZ Telephone Co. Zone Density Pricing Plan," and must be received by the Secretary of the Commission no later than March 12, 1993.

The Bureau wishes to expedite release of a final decision so the LECs can implement their zone density plans as soon as possible after their expanded interconnection tariffs become effective. The Bureau is therefore extending comment deadlines briefly rather than establishing a separate comment cycle concerning the supplemental filings. This additional time will permit commenters to fully consider all the information filed with the Commission relating to the LECs' zone density pricing plans in only one round of pleadings. Companies that do not supply the supplemental information in a timely fashion will delay the Bureau's consideration of their plans, as interested parties must be allowed time to comment on the supplementary material.

As we stated in our February 24 public notice, all comments concerning a LEC's zone density pricing plan must be headed "Comments of [commenter's name]." Pleadings concerning the zone density pricing plans must include the caption of all zone density pricing plans that they address. In addition, the caption of all pleadings concerning a LEC's zone density pricing plan must read:

In the Matter of
XYZ Telephone Co.
Zone Density Pricing Plan

Comments must be filed no later than **March 26, 1993.** Replies must be filed no later than **April 2, 1993.** An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to ITS, Inc., the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington D.C. 20554, and four copies to the Chief, Tariff Division, Room 518, 1919 M. Street, N.W., Washington, D.C. 20554.

For further information contact Kelly Cameron or Debra Sabourin, Common Carrier Bureau, Tariff Division at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

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[1] Companies that filed their zone density pricing plans on February 16, 1993 were: Ameritech Operating Companies, Bell Atlantic, Bellsouth Telecommunications, Inc., Centel Corporation, Lincoln Telephone, NYNEX Telephone Companies, Southwestern Bell Telephone Company, Pacific Bell, Rochester Telephone Corporation, Southern New England Telephone Company, US West Communications, and United Telephone Companies. GTE Service Corporation submitted its plan on February 25, one day after the Bureau released its first public notice concerning the plans.

[2] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992)(*Expanded Interconnection Order).*

[3] Common Carrier Bureau Establishes Pleading Cycle for Zone Density Pricing Plans, Public Notice, DA 93-217, released February 24, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: March 12, 1993

MSS Above 1 GHz Negotiated Rulemaking Committee

AGENCY: Federal Communications Commission

ACTION: Notice of cancellation of public meetings.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons that the meetings of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee") scheduled for Thursday, March 18, 1993 and Wednesday, March 24, 1993 have been cancelled. These meetings were announced in Public Notices, DA 93-163 (58 FR 8927 (February 18, 1993)) and DA 93-252 (58 FR 13041 (March 9, 1993)), respectively.

FOR ADDITIONAL INFORMATION CONTACT: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

SUPPLEMENTARY INFORMATION: Subsequent Full Committee meetings are currently scheduled for Thursday, March 25; Tuesday, March 30; Wednesday, March 31, Friday, April 2; and Monday, April 5.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-39

In the Matter of

Amendment of Parts 80, 87 and 94 of the Commission's Rules Governing the Private Radio Services.

NOTICE OF PROPOSED RULE MAKING

Adopted: February 23, 1993; Released: March 25, 1993

Comments Due: May 14, 1993
Reply Comments Due: June 1, 1993

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend 47 C.F.R. Parts 80, 87 and 94 to relax or eliminate certain rules that impose an unnecessary regulatory burden.

II. DISCUSSION

2. First, Sections 80.25(a) and 87.27 of the Commission's Rules, 47 C.F.R. §§ 80.25(a) and 87.27, provide that licenses for stations in the maritime and aviation services respectively will normally be issued for a term of five years from the date of original issuance, major modification or renewal. Section 307(c) of the Communications Act of 1934 (Communications Act), 47 U.S.C. § 307(c), however, authorizes a ten-year term for such licenses. No regulatory purpose is served by restricting ship and aircraft station licenses to a five year term. Further, the requirement imposes an unnecessary burden both on the licensees, who must prepare and file the application form (there is a $35 application fee), and on the Commission, which must process the approximately 125,000 ship station and 40,000 aircraft station license applications it receives each year. Extending the license term would return approximately $2,900,000 per year to the economy. Accordingly, we propose to modify Sections 80.25 and 87.27 to provide a ten-year license term for ship and aircraft station licenses.

3. Second, Section 94.85 of the Commission's Rules, 47 C.F.R. § 94.85, requires that licensees in the Private Operational Fixed Microwave Service perform specified measurements to ensure that their transmitters are maintained within the frequency tolerances required by Section 94.67, 47 C.F.R. § 94.67. The records specified in Section 94.85, however, are not currently used by the Commission. Licensees must comply with our frequency tolerance rules at all times, so a one-time measurement serves little purpose. There does not appear to be a need, therefore, for a rule that requires licensees to follow a predesignated set of steps to prove compliance. Prior to the establishment in 1975 of Part 94,[1] operational-fixed radio facilities as well as private land mobile services were governed by Parts 89, 91 and 93 of the Commission's Rules. A year later, the Commission eliminated the required annual measurement of transmitter power, frequency and modulation for services governed by Parts 89, 91 and 93 (now consolidated in Part 90).[2] Part 94 operations were inadvertently omitted from consideration at that time, which caused an unwarranted disparity in regulating these private radio services. Consequently, we propose to rectify that oversight by eliminating the procedures outlined in Section 94.85.

4. Finally, Sections 94.113(a), (b), (d), (e) (f) and (g) of the Commission's Rules, 47 C.F.R. §§ 94.113 (a), (b), (d), (e), (f), and (g), require that licensees in the Private Operational Fixed Microwave Service maintain numerous records on station maintenance, including transmitter measurements and antenna inspections. Because licensees are required to maintain their systems in conformance with our rules, it is unnecessary to require specifically that they retain maintenance records. The purpose of retaining such records is to provide evidence of conformance with equipment specifications. If a station fails Commission inspection, or causes interference due to technical deficiencies, however, past compliance does not rectify current violation of the Commission's Rules. Failure to meet the Commission's technical standards, whether efforts have been made to do so or not, subjects a licensee to consequences such as the imposition of a monetary forfeiture. As noted above, Part 94 operations were inadvertently omitted from consideration when similar rules applicable to private land mobile services governed by Parts 89, 91 and 93 (now consolidated into Part 90) of the Commission's Rules were eliminated. We propose to remedy that oversight by eliminating the unnecessary and burdensome obligations imposed by Sections 94.113 (a), (b), (d), (e), (f), and (g).

III. PROCEDURAL MATTERS

5. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.206(a).

6. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **May 14, 1993,** and reply comments on or before **June 1, 1993**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular busi-

[1] *Report and Order*, 40 Fed. Reg. 20928 (1975).
[2] *Report and Order*, Docket No. 20665, 60 FCC 2d 591 (1976).

ness hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

7. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this *Notice*.

8. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(r) and 307(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i), 303(r) and 307(c).

9. For further information regarding this *Notice*, contact Marc S. Martin, Private Radio Bureau, Special Services Division, Aviation & Marine Branch, telephone (202) 632-7175, mail stop 1700C2.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IFRA) of the expected impact on small entities of the proposals contained in this *Notice*. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IFRA and must be filed by the deadlines provided in paragraph, *supra*. The Secretary shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

A. Reason for Action

2. The Commission is proposing rules affecting certain private radio services in order to eliminate a substantial burden on the public, reduce administrative costs and to improve government efficiency.

B. Objectives

3. We seek to reexamine the requirements of certain private radio service rules in order to reduce unnecessary burdens on the industry and administrative costs to the Commission and thereby increase efficiency in the affected private radio services and within the Commission.

C. Legal Basis

4. The proposed action is authorized under Sections 4 (i), 303(r) and 307(c) of the Communications Act, 47 U.S.C. §§ 154 (i), 303(r) and 307(c).

D. Reporting, Recordkeeping and Other Compliance Requirements

5. License terms in the aviation and marine radio services would be extended from five years to ten years. Private operational fixed microwave service licensees would have unnecessary reporting requirements eliminated.

E. Federal Rules Which Overlap, Duplicate or Conflict with These Rules

6. None.

F. Description, Potential Impact, and Small Entities Involved

7. The proposals would eliminate reporting requirements for private operational fixed microwave service licensees and extend the license terms for ship and aircraft station licensees. Consequently, the proposals would remove regulatory burdens on small businesses and, in the aviation and marine context, return approximately $ 2,900,000 to the economy. Further, the proposals would reduce administrative burdens associated with administering the affected private radio services.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

8. None.

APPENDIX B

Proposed Rules

Part 80 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - Stations in the maritime services

1. The authority citation for Part 80 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.25 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), adding a new paragraph (a), and revising newly redesignated paragraph (b) to read as follows:

§ 80.25 License term.

(a) Licenses for ship stations in the maritime services will normally be issued for a term of ten years from the date of original issuance, major modification, or renewal.

(b) Licenses other than ship stations in the maritime services will normally be issued for a term of five years from the date of original issuance, major modification, or renewal.

* * * * *

Part 87 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 87 - Aviation Services

1. The authority citation for Part 87 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.27 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), adding a new paragraph (a), and revising newly redesignated paragraph (b) to read as follows:

§ 87.27 License term.

(a) Licenses for aircraft stations will normally be issued for a term of ten years from the date of original issuance, major modification or renewal.

(b) Licenses other than aircraft stations in the aviation services will normally be issued for a term of five years from the date of original issuance, major modification, or renewal.

* * * * *

Part 94 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 94 - Private operational-fixed microwave service

1. The authority citation for Part 94 is revised to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.85 is removed in its entirety.

3. Section 94.113 is amended by removing the introductory paragraph, removing paragraphs (a), (d), (e), (f), and (g), removing and reserving paragraph (b), redesignating paragraph (c) as paragraph (a) and revising newly redesignated paragraph (a) introductory text to read as follows:

§ 94.113 Station records.

(a) When a station in this service has an antenna structure which is required to be illuminated, appropriate entries in its station records (logs) shall be made as follows:

* * * * *

(b) [Reserved]

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GE AMERICAN COMMUNICATIONS, INC. File No. I-T-C-91-078

Application for authority to provide service between the U.S. and Iceland

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1993; Released: March 25, 1993

By the Chief, International Facilities Division:

1. In an order released April 14, 1992, the Chief, International Facilities Division (Division) denied a Section 214 application filed by GE American Communications, Inc. (GE Americom) to acquire one T-1 (1.544 Mb/s) circuit to provide service between the U.S. and Iceland using the Satcom F2R domestic satellite.[1] The order was based on the well-established Transborder policy which provides that domestic satellites may be used for certain public international telecommunications services where: 1) INTELSAT cannot provide the service; or 2) it would be clearly uneconomical or impractical to use INTELSAT for the planned service.[2] The Division found that the record in this case demonstrated that INTELSAT could provide the requested service.

2. On May 14, 1992, GE Americom filed an application for review of the Division's decision which denied its application to provide service between the U.S. and Iceland. By letter dated March 11, 1993, GE Americom requested that its underlying application and subsequent application for review be returned and that the April 14, 1992 decision be vacated as moot.

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 214, that the Division's April 14, 1992 decision denying GE Americom's application IS VACATED.[3]

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] GE American Communications, Inc., 7 FCC Rcd 2337 (1992).

[2] *See* Transborder Satellite Video Services, 88 FCC 2d 158 (1981); Satellite Business Systems, 88 FCC 2d 195 (1981). The "uneconomical or impractical" standard was set forth in a July 23, 1981 letter to the Commission from then Under Secretary of State James L. Buckley. This letter is referred to herein as the "Buckley letter".

[3] *See supra* note 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-3

In the Matter of

Arkansas Public Safety Plan

ORDER

Adopted: March 18, 1993; Released: March 25, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On December 3, 1992, Region 4 (Arkansas) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Arkansas.

2. The Arkansas Plan was placed on Public Notice for comments due on February 22, 1993, 58 FR 5730 (January 22, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Arkansas and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Arkansas.

4. Therefore, we accept the Arkansas Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Arkansas may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-272

In the Matter of

Amendment of Section 73.202(b), RM-8107
Table of Allotments,
FM Broadcast Stations.
(Alturas, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 25, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 7649 (1992), issued in response to a petition for rule making filed by KCNO, Inc. ("petitioner"), licensee of Station KYAX(FM), Channel 233C1, Alturas, California,[1] proposing the substitution of Channel 267C for Channel 233C1 and modification of its license accordingly. Petitioner filed supporting comments. Comments were also filed by Crystal Broadcasting Company ("Crystal").

2. In its comments, petitioner requests that the Commission allot Channel 267C at a different site from the site it specified in its original proposal and which was proposed in the *Notice* at coordinates 41-16-54 and 120-48-02. Petitioner states that there are United States Forest Service environmental concerns associated with the construction of power lines at the original location. Therefore, petitioner states, a revised location at coordinates 41-25-00 and 121-06-32 is preferable since it is an established "electronic site" with power already on site and with fewer environmental concerns.

3. The *Notice* stated that petitioner's nonadjacent modification request could not be implemented if another expression of interest was received unless an additional equivalent class channel was also allotted. H& In that regard, we advised that should other parties express an interest in applying for a Class C channel at Alturas, Channel 293C is available at that community. In response to the *Notice*, Crystal stated its interest in applying for a second Class C allotment at Alturas.

4. We believe the public interest would be served by granting the modification proposal at Alturas since it will enable Station KYAX(FM) to provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g)(2) of the Commission's Rules, we will substitute Channel 267C for Channel 233C1 at Alturas and modify the license for Station KYAX(FM) accordingly. Additionally, we will allot Channel 293C to Alturas, as proposed in the *Notice* as an additional equivalent class channel based upon Crystal's expression of interest in providing a second local FM service to that community.

5. Channel 267C can be allotted to Alturas at the petitioner's suggested site, located 48.3 kilometers (30 miles) west of the community.[2] Channel 293C can be allotted to Alturas without a site restriction.[3]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Alturas, California, as follows:

City	Channel No.
Alturas, California	267C, 293C

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KCNO, Inc. (File No. BLH-890920KE) for Station KYAX(FM), Alturas, California, IS MODIFIED to specify operation on Channel 267C in lieu of Channel 233C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or

[1] Petitioner is also the licensee of Station KCNO(AM), Alturas.

[2] As indicated above, coordinates at the petitioner's suggested site for Channel 267C at Alturas are 41-25-00 and 121-06-32. As indicated in the *Notice*, the Alturas proposal is short-spaced to the construction permit issued for Station KCHQ(FM), Channel 267C1, Altamont, Oregon. Station KCHQ(FM) was modified effective September 8, 1992, to specify operation on Channel 249C1, in MM Docket No. 91-341. *See* 7 FCC Rcd 4599 (1992). However, the issuance of a license for Station KYAX(FM) on Channel 267C at Alturas may be withheld until Station KCHQ(FM) is authorized to operate on Channel 249C1 at Altamont. We will serve a copy of this *Report and Order* on the licensee of Station KCHQ(FM).

[3] Coordinates used for Channel 293C at Alturas are 41-29-18 and 120-32-18.

upgrade. As a result of this proceeding, KCNO, Inc., licensee of Station KYAX(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* to the permittee of Station KCHQ(FM), Altamont, Oregon, as follows: Western States Broadcasting, 12550 Brookhurst Street, #A, Garden Grove, California 92640.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. The window period for filing applications on Channel 293C at Alturas, California, will open on **May 11, 1993,** and close on **June 10, 1993**.

12. For further information concerning the Alturas modification, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 293C at Alturas should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-284

In the Matter of

Amendment of Section 73.202(b),	RM-8119
Table of Allotments,	
FM Broadcast Stations.	
(Repton, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 25, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 7991 (1992), issued in response to a petition filed by Curry Communications, Inc. ("petitioner") proposing the allotment of Channel 266A to Repton, Alabama, as that community's first local aural transmission service. Petitioner filed comments reiterating its intention to apply for Channel 266A if allotted to Repton, as requested.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 266A to Repton since it could provide a first local aural transmission service to the community. As indicated in the *Notice*, Channel 266A can be allotted to Repton in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of " 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Repton, Alabama, as follows:

City	Channel No.
Repton, Alabama	266A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications for Channel 266A at Repton, Alabama, will open on **May 11, 1993,** and close on **June 10, 1993**.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly.

[2] Coordinates used for Channel 266A at Repton are 31-24-30 and 87-14-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-225

In the Matter of

Amendment of Section 73.202(b), RM-8073
Table of Allotments,
FM Broadcast Stations.
(Northport, Alabama and
Macon, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 25, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 7945 (1992), issued in response to a petition filed by Warrior Broadcasting, Inc. ("petitioner"), licensee of Station WLXY(FM), Channel 264A, Northport, Alabama, proposing the substitution of Channel 264C3 for Channel 264A at Northport and modification of its license accordingly. To accommodate the proposal, the *Notice* also proposed the deletion of vacant Channel 263A at Macon, Mississippi, or alternatively, the placement of a site restriction on the existing Macon allotment, as requested.[1] [2] Petitioner filed supporting comments reiterating its intention to apply for Channel 264C3 if allotted to Northport, as requested.[3] No other comments were received.

2. We note that no expressions of interest advocating retention of Channel 263A at Macon, Mississippi, were received in response to the *Notice*. Therefore, the allotment will be deleted.

3. We believe the public interest would be served by substituting 264C3 for Channel 264A at Northport, Alabama, since it could enable Station WLXY(FM) to provide an expanded coverage FM service to the community. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Warrior Broadcasting, Inc. for Station WLXY(FM) to specify operation on Channel 264C3 in lieu of Channel 264A at Northport.

4. Channel 264C3 can be allotted to Northport, Alabama, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site located 15.2 kilometers (9.4 miles) west of the community, based upon the deletion herein of Channel 263A at Macon, Mississippi.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Northport, Alabama	264C3
Macon, Mississippi	--

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Warrior Broadcasting, Inc. (BLH-910717KA) for Station WLXY(FM), Northport, Alabama, IS MODIFIED to specify operation on Channel 264C3 in lieu of Channel 264A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Warrior Broadcast-

[1] As stated in the *Notice*, Channel 263A was allotted to Macon, Mississippi, in MM Docket No. 85-263. *See* 51 Fed. Reg. 23763, July 1, 1986. An application for Channel 263A was granted on March 2, 1987. Although a construction permit was issued to WMXG, Inc. (File No. BPH-890531JJ), the station remained unbuilt. Ultimately, the construction permit for Station WMXG(FM) was forfeited and cancelled by letter on June 23, 1992. Reconsideration of the cancellation was not sought by WMXG, Inc. and therefore the Commission's action became final on July 23, 1992.

[2] The *Notice* stated that in the event no expression of interest in retaining the channel at Macon was filed, the allotment would be deleted.

[3] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly.

[4] Coordinates for Channel 264C3 at Northport are 33-16-00 and 87-44-01. The site restriction is required to avoid a short-spacing to the licensed site of Station WHMA-FM, Channel 263C, Anniston, Alabama, at coordinates 33-37-38 and 85-53-25.

ing, Inc., licensee of Station WLXY(FM) is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-205

In the Matter of

Amendment of Section 73.202(b), RM-8059
Table of Allotments,
FM Broadcast Stations.
(Belle Plaine, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 25, 1993

By the Chief, Allocations Branch:

1. At the request of Cynthia A. Siragusa ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5622 (1992), permittee of a new FM station on Channel 238A at Belle Plaine, Iowa, proposing the substitution of Channel 238C3 for Channel 238A at Belle Plaine, and the modification of her construction permit (File No. BPH-910905MB) to specify operation on the higher class channel. Comments were filed by the petitioner reiterating her intention to file for the channel, if allotted, and by Washington Radio, Inc. ("WRI"), licensee of Station KCII-FM, Channel 291A, Washington, Iowa. Reply comments were filed by the petitioner.

2. As stated in the *Notice*, Station KCII-FM is presently operating on Channel 237A even though its license has been modified to Channel 291A pursuant to the *Report and Order* in MM Docket 89-451.[1] WRI does not object to the allotment of Channel 238C3 at Belle Plaine but requests that the grant be conditioned so as to prevent the station from commencing operation on the new channel if interference would be caused to the present operation Station KCII-FM or until the station begins operating on Channel 291A. In response, petitioner states her willingness to defer operation on Channel 238C3 until Station KCII-FM begins operation on Channel 291A.

3. We believe the public interest would be served by substituting Channel 238C3 for Channel 238A at Belle Plaine, Iowa, since it could provide the community with a wide coverage area FM service. Channel 238C3 can be allotted to Belle Plaine in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.8 kilometers (10.4 miles) south to avoid a short-spacing to Station KQMG-FM, Channel 237A, Independence, Iowa, and to accommodate petitioner's desired transmitter site.[2] Use of this site restriction does not negate the short-spacing to Station KCII-FM, Channel 237A, Washington, Iowa. Therefore, issuance of a license for Channel 238C3 at Belle Plaine may be withheld until Station KCII-FM, Washington, Iowa, commences operation on Channel 291A in accordance with MM Docket No. 88-451.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Belle Plaine, Iowa	238C3

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Cynthia A. Siragusa for a new station at Belle Plaine, Iowa (BPH-910905MB), IS MODIFIED to specify operation on Channel 238C3, in lieu of Channel 238A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Cynthia A. Siragusa, permittee of a new station at Belle Plaine, Iowa, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

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[1] *See* 6 FCC Rcd 364 (1991). Station KCII-FM's license was modified to Channel 291A to accommodate the modification of Station KOKX-FM's license from Channel 237A to Channel 237C1 at Keokuk, Iowa. Station KOKX-FM has pending before the Commission its application for a construction permit on Channel 237C1 (File No. BPH-911030IC).

[2] The coordinates for Channel 238C3 at Belle Plaine are North Latitude 41-45-00 and West Longitude 92-19-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-178

In the Matter of

Amendment of Section 73.202(b), RM-8045
Table of Allotments,
FM Broadcast Stations.
(Lawton, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 25, 1993

By the Chief, Allocations Branch:

1. At the request of Communicorp, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5908 (1992), proposing the substitution of Channel 231C2 for Channel 232A at Lawton, Oklahoma, and the modification of Station KQLI's license to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 231C2 for Channel 232A at Lawton since it could provide the community with an additional wide coverage area FM service and enable Station KQLI to expand its service area. Channel 231C2 can be allotted to Lawton in compliance with the Commission's minimum distance separation requirements at the station's licensed transmitter site.[1] As proposed, we will also modify Station KQLI's license to specify operation on Channel 231C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lawton, Oklahoma	231C2, 237A, 251C1, 258C2, 268C1, 297C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Communicorp, Inc., for Station KQLI, Lawton, Oklahoma, IS MODIFIED to specify operation on Channel 231C2, in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Communicorp, Inc., licensee of Station KQLI, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 231C2 at Lawton are North Latitude 34-34-24 and West Longitude 98-28-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-64

In the Matter of

Amendment of Section 73.202(b), RM-8195
Table of Allotments,
FM Broadcast Stations.
(Corning, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: March 25, 1993

Comment Date: May 17, 1993
Reply Comment Date: June 1, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Phoenix Broadcasting, Inc. ("petitioner"), licensee of Station KCEZ(FM), Channel 264B, Corning, California, seeking the substitution of Channel 264C1 for Channel 264B and modification of its license accordingly.[1] Petitioner stated its intention to apply for Channel 264C1 if allotted to Corning, as requested.

2. We believe the public interest would be served by consideration of petitioner's proposal since it could provide Corning with an expanded coverage area FM service. Channel 264C1 can be allotted to Corning consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site, located 37.7 kilometers (23.4 miles) north of the community.[2]

3. Petitioner's modification request at Corning conforms with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we shall propose to modify the license for Station KCEZ(FM) without entertaining competing expressions of interest in the use of Channel 264C1 at Corning, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Corning, California, as follows:

	Channel No.	
City	Present	Proposed
Corning, California	264B	264C1

5. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the licensee of Station KWHO(FM), as follows: Tristar Broadcasting Corporation, Inc., P.O. Box 1023, Weed, CA 96094.[3]

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **May 17, 1993,** and reply comments on or before **June 1, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Dennis J. Kelly, Esq.
Cordon and Kelly
Post Office Box 6648
Annapolis, MD 21401

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or

[1] Petitioner states that its present transmitter site, located south of the 40$ parallel in Zone I-A, at coordinates 39-53-17 and 122-37-38, is licensed as a Class B facility, the highest class allowed in that Zone. The instant proposal would relocate its transmitter to Zone II, where the maximum FM facilities authorized are for Class C stations. *See* Sections 73.202(a), 73.205, and 73.210 of the Commission's Rules.

[2] Coordinates used for Channel 264C1 at Corning are 40-15-31 and 122-05-20. Although the Corning proposal is short-spaced to the licensed operation of Station KWHO(FM), Channel 265A, Weed, California, at coordinates 41-21-12 and 122-15-35, Station KWHO(FM) was modified effective September 4, 1990, to specify operation on Channel 272C1, for which a construction permit has been issued (File No. BPH-901130ID). *See* MM Docket No. 88-28, 5 FCC Rcd 4558 (1990), *recon. denied*, 7 FCC Rcd 4641 (1992). Although we have determined that issuance of this *Notice of Proposed Rule Making* is appropriate at this time, we may withhold final action in this matter until Station KWHO(FM) is granted a license to operate on Channel 264C1 at Weed. We will serve a copy of this *Notice* on Tristar Broadcasting Corporation, Inc., licensee of Station KWHO(FM).

[3] Florence M. Gasky ("Gasky") was the licensee at the time Station KWHO(FM) was modified to specify operation on Channel 272C1 at Weed in MM Docket No. 88-28. An assignment of the license from Gasky to Tristar Broadcasting Corporation, Inc. was granted June 16, 1992, and consummated July 1, 1992.

review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-48

In the Matter of

Amendment of Section 73.202(b), RM-7922
Table of Allotments,
FM Broadcast Stations.
(Bagdad, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 5, 1993; Released: March 25, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 1945 (1992) ("*Notice*"), issued in response to a petition filed by Chris Sarros ("petitioner") proposing the allotment of Channel 280A to Bagdad, Arizona, as its first local aural transmission service. Petitioner filed supporting comments. No other comments were received.

2. Although Bagdad (population 1,858),[1] is listed in the 1990 U.S. Census as a census designated place ("CDP"), that listing is not sufficient by itself to establish community status for allotment purposes where the community lacks the traditional components the Commission typically associates with such status.[2] Therefore, in the *Notice*, petitioner was requested to provide information to demonstrate whether Bagdad contains any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental entities that identify themselves with that locality.

3. In response to the *Notice*, petitioner provided a "Community Profile" of Bagdad, as published by the Arizona Department of Commerce, which indicates that the community has its own post office, telephone exchange, utility company, medical facilities, sheriff's department, volunteer fire department, schools, churches, a library, and recreational facilities, as well as commercial and professional establishments. Additionally, petitioner provided information extracted from two area telephone directories reflecting Bagdad's residential and/or business listings.

4. In view of the above, we believe that Bagdad's listing as a CDP, in combination with the information provided by the petitioner, sufficiently demonstrates that Bagdad qualifies as a community for allotment purposes. Therefore, we believe that the public interest would be served by allotting Channel 280A to Bagdad since an interest has been expressed in providing a first local aural transmission service to the community.

5. As stated in the *Notice*, Channel 280A can be allotted to Bagdad in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules without a site restriction.[3] Additionally, as Bagdad is located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence in the proposal was obtained from the Mexican government.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Bagdad, Arizona	280A

7. The window period for filing applications on Channel 280A at Bagdad, Arizona, will open on **May 11, 1993,** and close on **June 10, 1993**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Population figure was taken from the 1990 U.S. Census.

[2] *See Searles Valley, California*, 3 FCC Rcd 5221 (1988); *see also Naples, Florida*, 41 RR 2d 1549 (1977).

[3] Coordinates used for Channel 280A at Bagdad are 34-34-52 and 113-12-14.

We note that Channel 280A at Bagdad is short-spaced to a counterproposal to allot Channel 280B to Needles, California, at coordinates 34-58-54 and 114-48-30 in MM Docket No. 92-194. Although another Class A channel was suggested for consideration at Bagdad, the counterproposal was filed after the comment period in the instant proceeding. Therefore, in an effort to accommodate all parties, we determined that an alternate Class B channel is available for allotment to Needles, and will be addressed in the context of MM Docket No. 92-194.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

CATHERINE L. WADDILL File No. MSD-92-3
316MS0013

Petition for Section 403
Investigation and Section 312
Order to Show Cause for
Markets 384A (Georgia 14, Worth), 559A
(New York 1, Jefferson), and
578A (North Carolina 14, Pitt)

and

In re *Pro Forma* Application of

G.M.D. PARTNERSHIP, File No. 02930-CL-AL-92
a California
Limited Partnership (Assignor)
and G.M.
D. PARTNERSHIP II,
a California
Limited Partnership (Assignee)

For assignment of station KNKN856
in the Domestic Public Cellular
Telecommunications Service in
Market 559A (New York 1, Jefferson)

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 2, 1993; Released: March 29, 1993

By the Commission:

I. INTRODUCTION

1. Catherine L. Waddill (Waddill)[1] has filed a Petition for Investigation and a Request for a Show Cause Order (Request), and a Petition for Reconsideration (Petition) against G.M.D. Partnership, a California Limited Partnership (GMD I)[2] and G.M.D. Partnership II, a California Limited Partnership (GMD II) (collectively, GMD)[3] alleging, *inter alia*, violations of the (1) real party in interest rules, (2) cross-ownership prohibitions, (3) alienation of interest prohibitions, (4) alien ownership provisions, (5) transfer of control requirements, (6) financial qualification requirements, and (7) *ex parte* rules. As set forth below, we find that GMD has violated Section 310(b)(3) of the Communications Act of 1934 (the Act), and Sections 1.1208, 1.1210, 22.13(a)(1)(iii), and 22.922 of the Commission's rules, and find that GMD is apparently liable for a $250,000.00 forfeiture.

II. BACKGROUND

2. Waddill has filed a Petition for an Investigation under Section 403 of the Act to determine whether GMD violated Sections 310(b)(3)[4] and 310(d) of the Act,[5] and Sections 1.1208(a), 1.1210,[6] 22.13(a)(1), 22.13(a)(1)(iii),[7] 22.917(c)(1),[8] 22.921(b), and 22.922 of the rules.[9] Within that pleading, Waddill also requests issuance of an order to show cause why GMD's authorizations for markets 384A, 559A, and 578A should not be revoked pursuant to Section 312 of the Act, and petitions for reconsideration of the grant of GMD's *pro forma* application to assign the authorization for market 559A, for violations of the foregoing provisions.[10] Voluminous responsive pleadings were filed.[11]

III. DISCUSSION

A. Alien Limited Partners

3. Waddill contends that Ulrike Robisin (Robisin) and Monique M.J. Elias (Elias) hold unlawful alien limited partnership interests in GMD's licenses for markets 559A, 384A, and 578A under Section 310(b)(3) of the Act. Conceding that Robisin and Elias are alien limited partners in GMD, GMD asserts that under its partnership agreements Robisin and Elias are restricted "from any meaningful participation in partnership management . . . [and, therefore,] *cannot* be deemed to hold powers comparable to those held by an officer or director of a corporation." GMD Opposition to Petition at 9 (emphasis in the original and footnote omitted).[12]

4. The Commission has held that limited partnership interests are subject to the citizenship requirements of Section 310(b) of the Act.[13] In addition, the Commission has determined that limited partnership interests which convey the power to participate in the partnership's management or operations are subject to the alien officer and director prohibitions of Section 310(b)(3) of the Act.[14] Moreover, the Commission has indicated that we would use the standards established in *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 97 FCC 2d 997 (1984), *reconsidered in part*, 58 Rad. Reg. 2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986) (*Attribution Orders*) to determine whether a limited partner is insulated from the partnership's management and operations for purposes of Section 310(b). *Id.*

5. Under the attribution standards, the partnership agreement "should either prohibit the . . . limited partner from voting on the removal of a general partner or limit this right to situations where the general partner is" removed for cause.[15] Also, if the limited partner is authorized to "vote on the admission of additional general partners, . . . the agreement should empower the general partner to veto any such admissions."[16] In addition, the partnership agreement "should restrict a limited partner from voting on any matters relating to the day-to-day operations of the business."[17] Under GMD's partnership agreements,[18] the alien limited partners may vote to remove the general partner without cause.[19] Also, the alien limited partners may vote on the election of additional general partners and their vote is not subject to the general partner's veto.[20] In addition, the alien limited partners in GMD I may vote on transactions occurring in the daily course of business operations.[21] We find that the authority of GMD's alien limited partners to exercise these powers confers the ability to manage the partnership's operations under the attribution standards and Section 310(b) of the Act.[22] Therefore, we

find that GMD has failed to demonstrate[23] that its partnership agreements provide its alien limited partners with sufficient insulation to fall outside the strictures of Section 310(b)(3). Accordingly, we find that the alien ownership interests in GMD's authorizations for markets 384A, 559A, and 578A are unlawful under Section 310(b)(3) of the Act. Further, we conclude that the fact that the Bureau granted GMD's various applications for RSA markets 384A, 559A, and 578A while the information giving rise to GMD's Section 310(b)(3) violations was a matter of Commission record does not "create any equities that would require us to excuse or otherwise overlook"[24] those statutory violations.

B. Alienation of Interests: Brignoni

6. Waddill contends that Angel Brignoni (Brignoni) admitted to her that he had an undisclosed interest in GMD I in violation of Section 22.13(a)(1) of the rules. Also, she avers that "during approximately the same period, Thomas J. McCabe actively solicited . . . [her] to sell interests in his and 'his clients'' already-filed applications." Waddill Request at 12. Waddill therefore asserts that because McCabe was the only person she knew to be soliciting the sale of interests in pending applications, "Brignoni's interest in GMD, which was and is McCabe's client, had been procured . . . through McCabe in violation of" Section 22.922 of the rules. *Id.* at 13. Brignoni denies that he held or holds an interest in GMD I; and McCabe denies "having sold or procured any interests in pending applications[,]" and having "met or spoken to" Brignoni. McCabe Opposition to Request, McCabe Declaration at 6,7. Further, Gary M. Doyle, who is and was at all relevant times GMD I's general partner, denies that GMD I entered into an agreement whereby Brignoni "now holds or at any future time would obtain. . . an interest in GMD." GMD Opposition to Request, Gary Doyle Declaration at 2.

7. We cannot afford decisional weight to the controverted allegations raised by Waddill. There is no independent or even circumstantial corroboration of the statements and conduct alleged, and no evidence to substantiate the claims made by Waddill. In short, the record provides us with no basis upon which we can determine that there is any substance to Waddill's assertions. Therefore, we find that Waddill's contentions lack sufficient factual basis to warrant an inquiry under Section 403 of the Act[25] for violations of Sections 22.13(a)(1) and 22.922 of the rules. Further, we find that there are insufficient grounds to support Waddill's request for institution of revocation proceedings under Section 312 of the Act for violations of Sections 22.13(a)(1) and 22.922 of the rules.[26]

C. Ownership Misrepresentation and Unauthorized Transfer of Control

8. Waddill next contends that GMD fraudulently misrepresented its ownership on its assignment application by failing to disclose that on September 9, 1991 (and pursuant to loan and security agreements), GMD gave NovAtel Finance, Inc. (NFI) "the foreign-government-controlled financier for GMD's cellular systems in New York 1, Georgia 14 and North Carolina 14, a secret seven percent interest in GMD[,]" in violation of Section 22.13(a)(1)(iii) of the rules.[27] Waddill Supplement to Petition at 2 (footnote omitted).[28] GMD avers that it was not required to report the debenture pursuant to *Cellular One of Terre Haute, Inc.*, 2 FCC Rcd 4752 (Mob. Serv. Div. 1987) (*Cellular One*).[29] Section 22.13(a)(1)(iii) requires applicants who assign authorizations to disclose "any person [engaged in the Public Mobile Services] holding five per cent [sic] or more of each class of debt securities. . . ."[30] We conclude that a debenture is a debt security and, therefore, that GMD violated Section 22.13(a)(1)(iii) by failing to disclose the debenture. In light of the MSD's decision in *Cellular One*, however, we recognize that GMD may not have been aware of the applicability of this requirement to the instant case, and we will take no action against GMD for its violation of Section 22.13(a)(1)(iii).[31]

9. In connection with her allegation regarding a violation of Section 310(b) of the Act, Waddill seems to contend that NFI assumed *de facto* control of GMD II in violation of Section 310(d) of the Act. Waddill asserts that "[i]f GMD does not comply with NFI's wishes, NFI can simply refuse any further funding and put GMD out of business." Waddill Supplement to Petition at 7-8. Waddill also asserts that "NFI can use the threat of foreclosure.." *Id.* at 7. GMD avers that its general partner controls GMD under Section 310(d) of the Act.[32] In determining whether an unauthorized transfer of control has occurred, "the Commission looks to whether the licensee has retained exclusive responsibility for the facilities. . . . If the licensee retains the normal incidents of exclusive responsibility, no transfer of control has occurred."[33] We find that Waddill's assertion is based solely on NFI's status as GMD's creditor and, therefore, she has failed to submit any evidence that NFI controls GMD within the meaning of Section 310(d) of the Act.[34] Therefore, we reject Waddill's contention.

D. Cross-Ownership Interests

10. Waddill contends that Lenoir S. Weeks held ownership interests in GMD I and Tide Management Venture 405's (Tide) applications for market 559A in violation of Section 22.921(b) of the rules.[35] GMD asserts that Lucille Weeks, Lenoir Weeks' wife, holds the relevant ownership interest in Tide's application.[36] GMD submits a declaration from Thomas I. Doyle (the general partner in Tide) in which he states that in compiling the list of Tide partners for purposes of Tide's application for market 559A, he referred to the signature appearing on the check (signed by Lenoir Weeks) which he had received for Mrs. Weeks' Tide partnership interest. Believing that Lenoir was a woman's name and knowing that Mrs. Weeks was the Tide partner because she had entered into the Tide partnership agreement in his presence, he listed Lenoir Weeks as the Tide partner.[37] Lenoir Weeks states that he has no ownership in Tide and Lucille Weeks states that she has no ownership in Palmcell. In view of GMD's explanation and the Weeks' statements, we find that GMD did no more than commit a minor clerical error, which is *de minimis* in impact and significance and warrants no remedial action.

11. Next, Waddill contends that Elias (*see supra* para. 3) and her husband, Jan H. Visser (Visser), held ownership interests in GMD I and Tide's applications for markets 316A, 384A, 559A, and 578A[38] in violation of Section 22.921. Waddill also states that "[t]here appears to be a suspicious connection between Shawn Wisdom listed in GMD's applications for . . . [markets 384A, 559A and 578A] and Scott Wisdom listed in Tide's applications for these same markets . . . . [because b]oth applicants list the same address for these two principals." Waddill Third Supplement to Petition at 6 n.5.[39] GMD states that the Wisdoms are siblings. Family or close personal relationships alone do not create a presumption of control for purposes of real party in interest considerations. *Virginia Commu-*

nications, Inc., 62 Rad. Reg. 2d 1001, 1010 (1987) (*Virginia*). [40] Therefore, we reject[41] Waddill's position on this matter.[42]

E. Alienation of Interests: Gary Doyle

12. Waddill claims that Arthur W. Schiff, Shawn Wisdom, and Rodman E. Van Sciver (Van Sciver) are not identified as having ownership interests in GMD I's application for market 316A, but they "show up as partners in GMD's applications for" markets 384A and 578A, in violation of Section 22.922 of the rules. Waddill Third Supplement to Petition at 8.[43] GMD states that after closure of the application filing windows for Block 2[44] (which includes market 316A), Gary Doyle conveyed his entire limited partnership interest in GMD I to Arthur W. Schiff and Shawn Wisdom, and a percentage of his interest in Palmcell to Van Sciver, as reflected in GMD I's subsequently-filed applications for Blocks 1 (which includes markets 384A and 578A), 3, and 5.[45] GMD contends that these conveyances "gave . . . prospective interests, and did not give any of those newly-added persons any interest in GMD I's first-filed Block 2 applications . . . ." *See* GMD Reply to Third Supplement to Petition at 16.

13. The GMD I and Palmcell partnership agreements signed by Arthur W. Schiff, Shawn Wisdom, and Van Sciver do not limit their interests to applications filed by GMD I in Blocks 1, 3, 4, and 5. Moreover, the signature pages accompanying the partnership agreements provide that each partnership share "represents 8.5 applications of the total of 428 applications in the partnership being offered" by GMD I. GMD I Partnership Agreement, Arthur W. Schiff and Shawn Wisdom's signature pages; Palmcell Partnership Agreement, Van Sciver signature page. Therefore, in the absence of any evidence which would suggest that Arthur W. Schiff, Shawn Wisdom, and Van Sciver's interests in GMD I do not include applications filed in Block 2, we find that Gary Doyle transferred interests in GMD I's Block 2 applications to Arthur W. Schiff, Shawn Wisdom, and Van Sciver in violation of Section 22.922 of the rules.[46] Furthermore, we find that GMD I is not entitled to a waiver of the anti-alienation provisions of Section 22.922 because the facts do not indicate that the violations occurred as a result of "its engagement in a legitimate business transaction totally unrelated to the filing of the cellular application . . . ." *Id.*

14. Waddill also claims that Lenoir Weeks and Helmut Huttenmayer (Huttenmayer) are not identified on GMD I's applications for markets 316A, 384A, and 578A, but are listed as owners on GMD I's application for market 559A in violation of Section 22.922.[47] GMD concedes that after GMD filed applications in Blocks 1, 2, 3, and 5, Gary Doyle assigned partial interests in Palmcell to Lenoir Weeks and Huttenmayer, as reflected in GMD I's applications for RSA Block 4, which includes market 559A. GMD asserts, however, that the assignments "*explicitly* excluded any interest in the previously-filed or prepared Block 1, 2, 3 and 5 series of RSA applications." GMD Reply to Third Supplement to Petition at 17 (emphasis in the original). The assignment agreements provide that the assignments relate exclusively to GMD's prospective applications for RSA Block 4.[48] Therefore, we find that Gary Doyle's assignments of partial interests in Palmcell to Lenoir Weeks and Huttenmayer do not violate Section 22.922 of the rules, and accordingly, we reject Waddill's claim.[49]

F. *Ex Parte* Violations

15. Waddill contends that GMD made prohibited "written *ex parte* presentations [in two letters] to the Common Carrier Bureau decision-making staff [(February letters)]."[50] Waddill Second Supplement to Petition at 2. Also, Waddill claims that H. Rusty Irvin (Irvin), "the regional manager of GMD's [New York] cellular system . . . and . . . an owner of GMD,"[51] "successfully solicited . . . Congressman [Martin] to engage in a prohibited *ex parte* presentation to [Alfred Sikes, the Chairman of the Commission (Sikes).]" *Id.* at 1.[52] GMD asserts that neither the February letters nor Martin's letter are prohibited *ex parte* presentations, and that Irvin's letter is not an impermissible solicitation. Section 1.1208(a) of the rules prohibits *ex parte* written presentations to decision-making personnel which are directed to the merits or outcome of a restricted proceeding.[53] Although status inquiries are permitted under the *ex parte* rules, an inquiry

> which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing of a proceeding [is prohibited.]

47 C.F.R. Section 1.1202(a).[54] Further, no person may solicit or encourage others to make a prohibited *ex parte* presentation,[55] although the solicitation of purely status inquiries is permitted.[56]

16. GMD's assignment application became a restricted proceeding when Waddill filed her petition for reconsideration on January 10, 1992.[57] Accordingly, *ex parte* written presentations and solicitations thereof were prohibited subsequent to that date. We find that GMD's February letters were (1) directed to the merits and outcome of the instant proceeding (*i.e.*, whether GMD's alien limited partners are properly insulated), (2) made to decision-making personnel, and (3) not served on Waddill. Therefore, the February letters constitute prohibited *ex parte* presentations under Section 1.1208(a) of the rules. In addition, while it is a close case, it appears that Irvin's letter to Congressman Martin constitutes an impermissible solicitation of a prohibited *ex parte* presentation under Section 1.1210 of the rules, as Irvin did not indicate to Congressman Martin that any "help" provided by sending a letter to the Commission be served on Waddill.[58] *See, e.g. Pepper Schultz*, 4 FCC Rcd 6393 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 3273 (1990).

G. Financial Qualifications

17. GMD states that its "lender, NovAtel Finance, Inc., informed GMD that it could expect no substantial additional funding under the line of credit until the Waddill Petition is resolved by the Commission." GMD Petition for Expedited Action at 4. In light of this statement, Waddill apparently contends that GMD was not financially qualified under Section 22.917(c)(1) of the rules. Waddill Reply at 4. Section 22.917(c)(1) requires "[a] non-wireline applicant for a new station . . . [to] demonstrate, at the time it files its application that it has either a firm financial commitment or available financial resources necessary to construct and operate for one year its proposed cellular system." The Commission has held that:

> statements by authorized carriers regarding the difficulty of completing financing arrangements due to perceived uncertainties following submission of pleadings affecting their grants do not, of themselves, constitute evidence of violations . . . .

Warner, 6 FCC Rcd at 6034. Therefore, under *Warner*, we find that GMD's statement does not establish that it was financially unqualified under Section 22.917 of the rules. Quite apart from this, Waddill offers no evidence to support her contention. Moreover, GMD asserts that it "still [has] a firm financial commitment from NovAtel." Letter from GMD to the Commission at 3 (Mar. 12, 1992).

H. Abuse of Process

18. Finally, GMD claims that Waddill's pleadings constitute an abuse of process. GMD's attorney avers that NovAtel Finance, Inc.'s attorney told him that Waddill's attorney "inform[ed] him that Ms. Waddill had possession of. . material, allegedly very damaging to GMD, that she intended to file with the FCC unless GMD was willing to enter into serious settlement discussions with her." GMD Opposition to Supplement to Petition, Declaration of Douglas W. Harold, Jr., at para. 13. While we find the allegation troubling, we find that GMD's contention is based on hearsay and, therefore, we reject it.

IV. CONCLUSIONS

19. As set forth above, we find that although GMD has violated Section 22.13(a)(1)(iii) of the rules, we will take no action against GMD for this violation. Also, we find that GMD has made *ex parte* presentations in violation of Section 1.1208 of the rules, and that GMD appears to have solicited an *ex parte* presentation in violation of Section 1.1210 of the rules. We find, however, that GMD's *ex parte* violations were not so severe as to warrant remedial sanction.[59] We caution GMD, however, that future violations of the *ex parte* rules will be met with appropriate administrative action. *See, e.g.*, 47 U.S.C. Sections 312(a), 503(b); 47 C.F.R. Section 1.1216. As also set forth *supra*, we find that Gary Doyle transferred interests in GMD I's Block 2 applications in violation of Section 22.922 of the rules. In addition, we find that the alien ownership interests in GMD's authorizations for markets 384A, 559A, and 578A are unlawful under Section 310(b)(3) of the Act. Although GMD's violations are serious,[60] the record discloses no evidence of misrepresentation, lack of candor, or intention to violate the Act or our rules.[61] The extraordinary remedy of revocation is therefore not appropriate here. Accordingly, there is no need to initiate a Section 403 inquiry or a revocation proceeding under Section 312(a) of the Act.[62]

20. However, we conclude that imposition of a lesser sanction for GMD's violations of the alien restrictions is appropriate[63] in light of the seriousness of the violations. Section 503(b)(1) of the Act provides that the Commission is authorized to impose forfeiture penalties upon persons who "willfully or repeatedly" fail to comply with the Act or the rules.[64] We find that GMD's violations of the alien provisions were (1) willful because GMD holds the authorizations for markets 384A, 559A, and 578A, and GMD I held the authorization for market 559A, and (2) repeated because the violations involve two persons in each of three markets. Therefore, we find that a forfeiture is authorized under Section 503(b)(1) for GMD's violations of Section 310(b)(3) of the Act. In determining the amount of the forfeiture to be imposed, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. Section 503(b)(2)(D). Although GMD's violations are apparently inadvertent, we consider GMD's violations to be serious. Moreover, GMD's violations of the alien provisions involve two persons in each of three markets. In addition, GMD's violations have continued over a significant period of time. Further, GMD repeatedly represented to the Commission that it was in compliance with the alien ownership restrictions. *See supra* note 12. Section 503(b)(6)(B) of the Act prohibits us from imposing a forfeiture penalty on common carriers for violations occurring more than one year prior to issuance of the notice of apparent liability. GMD's Section 22.922 violations occurred in 1988.[65] Therefore, we are prohibited from imposing a forfeiture penalty on GMD for its violations of the anti-alienation provisions under Section 503(b)(6)(B) of the Act.

21. In light of the repeated and continuing nature of GMD's violations of the alien provisions, after consideration of the factors set forth in Section 503(b)(2) of the Act, and consistent with *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied, amended and clarified on Commission motion*, 7 FCC Rcd 5339, *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*),[66] we find that GMD is apparently liable for a forfeiture in the amount of $250,000.00 for its continuing, repeated, and willful violations of the alien control provisions of Section 310(b)(3) of the Act.[67] In addition, we require GMD to reform GMD's partnership agreements[68] to adequately insulate its alien limited partners from participating in the management and control of GMD under the attribution standards and Section 310(b)(3) of the Act.[69] Further, we require GMD to submit copies of the reformed partnership agreements to the Commission within 30 days of the release date of this order.

V. ORDERING PARAGRAPHS

22. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.80 of the Commission's rules, IT IS ORDERED that G.M.D. Partnership, a California Limited Partnership and G.M.D. Partnership II, a California Limited Partnership ARE JOINTLY APPARENTLY LIABLE FOR A FORFEITURE in the amount of two hundred fifty thousand dollars ($250,000.00) for continuing, willful, and repeated violations of Section 310(b)(3) of the Act.

23. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the rules, that G.M.D. Partnership, a California Limited Partnership and G.M.D. Partnership II, a California Limited Partnership, within thirty days (30) of the release date of this notice, shall pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or the amount should be reduced.

24. IT IS FURTHER ORDERED that payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment instrument File No. 02930-CL-AL-92, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission, at: Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482.

25. IT IS FURTHER ORDERED that G.M.D. Partnership, a California Limited Partnership and G.M.D. Partnership II, a California Limited Partnership reform their limited partnership agreements to comply with the guidelines set forth in this order.

26. IT IS FURTHER ORDERED that G.M.D. Partnership, a California Limited Partnership and G.M.D. Partnership II, a California Limited Partnership submit to the Commission copies of the reformed limited partnership agreements within thirty (30) days of the release date of this order.

27. IT IS FURTHER ORDERED that a copy of this memorandum opinion and order and notice of apparent liability for forfeiture shall be sent by certified mail to: G.M.D. Partnership, a California Limited Partnership and G.M.D. Partnership II, a California Limited Partnership, 333 East Arlington Blvd., Greenville, North Carolina 27858.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Waddill, "through a general partnership of which [she] . . . is a member, 50 State Cellular, . . . applied for nonwireline cellular licenses in substantially all of the 428 [RSAs] . . . ." Waddill Request at 2.

[2] GMD I filed non-wireline cellular applications for all 428 Rural Service Area (RSA) markets. GMD I received the non-wireline cellular authorizations for markets 559A (New York 1 - Jefferson), 384A (Georgia 14 - Worth), and 578A (North Carolina 14 - Pitt). *See* Public Notice, Report Nos. CL-90-295, CL-91-46, and CL-90-277 (released Aug. 30, 1990, Dec. 5, 1990, and Aug. 13, 1990, with respect to markets 559A, 384A, and 578A, respectively).

[3] GMD I assigned its authorization for market 559A to GMD II. *See* Public Notice, Report No. CL-92-29 (released Dec. 11, 1991) (assignment application granted on November 29, 1991); *see also* GMD's assignment application for market 559A (in proposing that the authorization be owned indirectly through GMD II and asserting that the assignment is *pro forma*, GMD states that GMD II's partnership agreement is substantially similar to GMD I's agreement and that GMD II's ownership is identical to GMD I's ownership). On May 28, 1992, December 23, 1991, and December 4, 1991, GMD filed an FCC Form 489 for markets 384A, 559A, and 578A, respectively, notifying the Commission of completion of construction pursuant to Section 22.43(c)(2) of the rules. *See Vivian E. Warner*, 6 FCC Rcd 6033, 6034 (1991), *appeal docketed*, No. 91-1571 (D.C. Cir. 1991) (*Warner*) (the construction "authorization and the notification constitute the operating authority." (Footnote omitted)).

[4] Section 310(b)(3) of the Act provides that:

> [n]o . . . common carrier . . . license shall be granted to or held by . . . any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives . . . .

[5] Section 310(d) of the Act prohibits the transfer of control of a corporation holding a construction permit or station license "to any person except upon application to the Commission."

[6] Section 1.1208(a) of the rules provides that "[u]nless exempted under [Section] 1.1204(b), *ex parte* presentations are prohibited in restricted proceedings." Section 1.1210 provides that "[n]o person shall solicit or encourage others to make any presentation which he or she is prohibited from making . . . [under the *ex parte* rules.]"

[7] Section 22.13 of the rules provides that:

> (a) Each application for a radio station authorization or for consent to assignment . . . shall:
>
> (1) Disclose fully the real party or parties in interest, that are engaged in the Public Mobile Services, including the following information: . . . .
>
> (iii) A list of the names of any person holding five per cent [sic] or more of each class of stock, warrants, options or debt securities.

[8] Section 22.917(c)(1) of the rules requires "[a] non-wireline applicant for a new station. . . [to] demonstrate, at the time it files its application that it has either a firm financial commitment or available financial resources necessary to construct and operate for one year . . . ."

[9] Section 22.921(b)(1) of the rules provides that "no party to a non-wireline application shall have an ownership interest . . . in more than one application for the same" RSA. Section 22.922 of the rules provides that "the sale, transfer, assignment or other alienation of any cellular application to offer service to . . . [RSAs] is prohibited prior to the grant of a construction authorization."

[10] On January 8, 1993, and pursuant to a settlement agreement, Waddill filed pleadings withdrawing her Request and Petition under Section 22.29. *See* 47 C.F.R. Section 22.29(b) ("Parties which, under a settlement agreement, apply to the Commission for . . . dismissal of . . . pleadings . . . shall at the time of filing notify the Commission that such filing is the result of an agreement. . . ."). While we will not rule on her withdrawn pleadings, we will nevertheless consider the serious allegations made against GMD in this memorandum opinion and order and notice of apparent liability for forfeiture (Order).

[11] In her Request, Waddill also requested an investigation to determine whether Thomas J. McCabe (McCabe) and Sarkice T. Nedder, in concert with John L. Huerta, James K. Larrington, Phillip C. Holt, and Cynthia M. Spittler (collectively, McCabe *et al.*) violated Sections 22.13(a)(1), 22.921(b), and 22.922 of the rules. In addition, Waddill requested issuance of an order to show cause why the authorizations for markets 324A and 532A should not be revoked for violations of the foregoing rules. The factual issues which Waddill raises against GMD are substantially unrelated to those she raises against McCabe *et al* Therefore, we do not consider the issues raised against McCabe *et al.* in this Order.

[12] Throughout the processing of its various applications and amendments, GMD repeatedly asserted that it complies with the alien ownership restrictions. *See* GMD I's applications for markets 559A, 384A, and 578A, Schedule A at 2, item 12 (filed on Dec. 8, 1988, Nov. 17, 1988, and Nov. 9, 1988, respectively) (GMD I certifies that it complies with the provisions of Section 310(b) of the Act and Section 22.4 of the rules regarding alien ownership and control); *see also* Letters from GMD I to the Commission at 2 (filed with respect to markets 559A, 384A, and 578A on Nov. 20, 1989, Oct. 11, 1989, and Sept. 29, 1989, respectively) (after

winning the lottery for each of the three markets, and pursuant to the Bureau's request for GMD I's partnership agreement and additional information regarding GMD I's partners, *see* Public Notice, Report Nos. CL-90-34, CL-90-3, and CL-89-277, (released Nov. 9, 1989, Oct. 5, 1989, and Sept. 21, 1989, respectively), GMD I submits its partnership agreement and states that Robisin and Elias "are citizens of West Germany and the Netherlands, respectively[,]. . . and . . . . are, of course, limited partners of GMD [I] with no voting or other managerial or decisional authority"); *see also* minor amendments to GMD I's applications for market 559A, 384A, and 578A (dated Dec. 8, 1989, Nov. 3, 1989, and Oct. 23, 1989, respectively) (GMD I asserts that its applications comply with Section 22.4(b) of the rules because Robisin and Elias are and have always been alien limited partners of GMD who exercise no "managerial or decisional authority over GMD"); *see also* GMD's modification applications for markets 559A and 578A, Schedule A at item 12 (filed Oct. 11, 1991 and Oct. 18, 1991, respectively) and GMD's assignment application, FCC Form 490 at item 11 (filed Nov. 19, 1991) (GMD certifies that its application complies with Section 310(b) of the Act and Section 22.4 of the rules regarding alien ownership and control).

[13] *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, 103 FCC 2d 511, 513 (1985), *reconsidered in part*, 1 FCC Rcd 12 (1986) (*Wilner*).

[14] *Wilner*, 103 FCC 2d at 520 n.43.

[15] Specifically, a limited partner may remove a general partner for cause when the general partner (1) is subject to bankruptcy proceedings, (2) is adjudicated incompetent, or (3) has been found by an independent party to have "engaged in malfeasance, criminal conduct or wanton or willful neglect." *Attribution Order*, 58 Rad. Reg. 2d at 620 (footnote omitted); *Attribution Order*, 1 FCC Rcd at 803; *see also Attribution Order*, 58 Rad. Reg. 2d at 617 n.51 (in finding that a limited partner's unrestricted power to remove a general partner confers the ability to control partnership affairs, the Commission stated that "a general partner is likely to follow the advice of a limited partner if he or she knows that the limited partner possesses" such power).

[16] *Attribution Order*, 58 Rad. Reg. 2d at 619-620; *see id.* at 621 n.72 ("Subject to the veto of the general partner, the exempt limited partner can vote on the admission of new partners. . . .").

[17] *Attribution Order*, 58 Rad. Reg. 2d at 619 n.63; *see id.* at 621 n.72 (the limited partner may "vote on the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the business other than in the ordinary course of the business."). Similarly, "the partnership agreement should restrict . . . limited partners from communicating with the . . . general partner on matters pertaining to the day-to-day operations of its business." *Id.* at 619 (footnote omitted). *See also id.* at 619-620.

[18] GMD I filed its applications for markets 384A, 578A, and 559A on November 17, 1988, November 9, 1988, and December 8, 1988, respectively, and GMD filed its assignment application on November 19, 1991. Therefore, GMD was on notice that the partnership agreements were subject to the insulation standards set forth in *Wilner* and the *Attribution Orders*.

[19] Specifically, Section 12.1 of GMD's partnership agreements provides that the general partners may be removed by a "majority vote of all the limited partners in the partnership."

[20] *See* GMD partnership agreements at Section 11.2(b).

[21] Specifically, Section 11.2(d) of GMD I's partnership agreement provides that the limited partners "have the right by vote of a [m]ajority, to approve or disapprove . . . [a]ny sale, exchange, refinance or pledge of the [p]roperty . . . ."

[22] Moreover, GMD's partnership agreements do not prohibit the alien limited partners from advising the general partner on daily activities, or acting as an employee, contractor, or agent for the partnership. *See supra* note 17.

[23] *See Wilner*, 103 FCC 2d at 520 n.43 ("[T]he licensee has the burden of proving that alien limited partners do not in fact substantially participate in the management or operations of the business.").

[24] *Spanish International Communications Corporations*, 2 FCC Rcd 3336, 3339 (1987) (subsequent history omitted) (after two corporations were found to be in violation of Section 310(b)(3) of the Act, the Commission held that "[n]either the licensees' record nor the Commission's routine grant of their renewal applications over the past 20 years is relevant in determining whether these stations were under alien control in violation of the statute. Nor do these matters create any equities that would require us to excuse or otherwise overlook a significant Section 310(b)(3) violation.") (*SICC*).

[25] *See, e.g., New Continental B/Cing Co.*, 93 FCC 2d 1275, 1277 (1983).

[26] *See Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978).

[27] Waddill contends that NFI is an alien, "a representative of a foreign government . . . .[, and a corporation] controlled by a corporation of which more than one-fourth of its capital stock is owned of record by a foreign government, within the meaning of Section 310 [of the Act]." Waddill Supplement to Petition at 3-4 ("NFI is an indirect, wholly-owned subsidiary of Novatel Communications, Ltd., a Canadian corporation owned by Provincial Government of Alberta . . . .").

[28] NFI states that NFI and GMD executed a convertible redeemable debenture (debenture) in NFI's "favor in conjunction with . . . [a loan and security agreement between NFI and GMD], dated September 9, 1991." GMD Opposition to Supplement to Petition, Declaration of Peter W. Mitchell, Vice President and Treasurer of NFI. NFI also states that under the terms of the debenture, NFI "can[] acquire . . . a potential seven percent limited partnership interest [in GMD]. . . after three years and then, only if GMD has not already prepaid the [d]ebenture." *Id.*

[29] *Cellular One* states that Section 22.13(a)(1)(iii) of the rules does "not require the submission of information concerning businesses or persons other than those which have financial interests in other Part 22 licensees, permittees, or applicants *in the same geographic area*." 2 FCC Rcd at 4752 (footnote omitted and underlining added). To the extent the Mobile Services Division's (MSD) decision in *Cellular One* is inconsistent with our rule and findings herein, it is overruled.

[30] GMD also claims that it was not required to report the debenture under *Real Party in Interest Disclosure Requirements in the Public Mobile Radio Service, Public Notice*, Mimeo 1060, 52 Rad.Reg.2d 1053 (released November 26, 1982) (*Public Notice*). GMD cites the *Public Notice* for the proposition that "the real party in interest provisions were adopted to prevent an applicant from filing numerous applications in the same geographic area under different names." *Id.* The *Public Notice* explicitly states that "the entities required by [Sections 22.13(a)(1)] . . . to be listed are . . . those entities which have financial interests in PMRS licensees, permittees or applicants." *Id.* The *Public Notice* does not limit the reporting requirement to entities with interests "in the same geographic area." Therefore, we reject GMD's claim.

In addition, GMD avers that NFI is not "engaged in the Public Mobile Service in the United States" within the meaning of Section 22.13(a)(1)(iii). GMD Opposition to Supplement to Petition at 9. At the time GMD filed its assignment application NFI held (and continues to hold) financial interests in markets 384A, 559A, and 578A. *See, e.g., GMD Petition for Expedited Action* at 5

(GMD's "sole source of debt financing to cover vitally necessary construction and operational funding [for markets 384A, 559A, and 578A] is [NFI.]"). An entity with financial interests in Part 22 licensees, permittees, or applicants is engaged in the Public Mobile Services under Section 22.13(a)(1)(iii). *See, e.g., Public Notice* at 1053. Therefore, with respect to each market, we find that NFI is "engaged in the Public Mobile Services" under Section 22.13(a)(1)(iii). Accordingly, we reject GMD's assertion.

[31] Waddill also contends that GMD failed to disclose the debenture in violation of Section 1.65(a) of the rules. Section 1.65 requires applicants to update pending applications to reflect substantial and significant changes in the information contained therein which occur after filing the applications. GMD and NFI executed the debenture on September 9, 1991, and GMD filed the the assignment application on November 19, 1991. *See supra* notes 12, 28. Therefore, because Section 1.65(a) involves post-filing changes, we find that Section 1.65(a) is inapplicable and, accordingly, we reject Waddill's contention.

[32] Gary M. Doyle, who is and has been GMD I and GMD II's general partner at all relevant times, states that he

> [(1) has] unfettered use of the facilities and equipment . . . . [,(2)] control[s] . . . all daily operations. . . . [,(3)] determine[s] . . . policy decisions . . . . [, (4) is] in charge of all employment, supervision and dismissal of personnel . . . . [and] payment of financing obligations, ... [and (5)] receive[s] all monies and profits derived from the operation of the facilities.

GMD Opposition to Supplement to Petition, Gary Doyle Declaration at 1.

[33] *Charles B. Shafer*, 56 Rad. Reg. 2d 658, 659 (1984).

[34] *See Turner Communications Corp.*, 68 FCC2d 559, 563 (1978); *see, e.g., Mobile Communications of America*, 1 FCC Rcd 1260, 1262 (Mobile Serv. Div. 1986).

[35] *See* GMD I application for market 559A, Palmcell General Partnership (Palmcell) real party in interest exhibit (through his ownership interest in Palmcell, which is a 50 percent limited partner in GMD I, Lenoir Weeks indirectly owns a 2 percent interest in GMD I); *see also* Tide application for market 559A, Table 1-1 at 1-3 (Lenoir Weeks is identified as a limited partner in Tide).

[36] *See* Tide application for market 559A, Exhibit 2, Tide Agreement, signature page of Lucille M. Weeks (Lucille Weeks (not Lenoir Weeks) holds the relevant ownership interest in Tide); *cf.* Tide application for market 559A, Table 1-1 at 1-3, *infra*, note 39.

[37] GMD submits a declaration from Lenoir Weeks in which he states that "[a]s a long-standing family routine, [he] write[s] and sign[s] all checks drawn on [their] joint checking account," including the check for Lucille Weeks' partnership interest. GMD Reply to Third Supplement to Petition, Declaration of Lenoir Weeks at 1.

[38] *See* GMD I applications for markets 316A, 384A, 559A, and 578A (Elias is a limited partner in GMD I); *see also* Tide's applications for markets 316A, 384A, 559A, and 578A (Visser is a limited partner in Tide).

[39] *See* GMD I applications for markets 384A, 559A, and 578A (Shawn Wisdom is a limited partner in GMD I); *see also* Tide applications for markets 384A, 559A, and 578A (Scott Wisdom is a limited partner in Tide).

[40] *See, e.g., Algreg Cellular Engineering*, Hearing Designation Order, 6 FCC Rcd 2921 (Com.Car.Bur. 1991); *Florida Cellcom*, 2 FCC Rcd 7044 (Com.Car.Bur. 1987).

[41] Waddill also contends that Arthur W. Schiff and A. W. Schiff, Jr., as the names appear on GMD I and Tide's applications, respectively, for markets 384A, 559A, and 578A, are names for the same person who held cross-ownership interests in those applications in violation of Section 22.921(b). Noting Arthur Schiff and A.W. Schiff, Jr.'s different signature styles as they appear in GMD I and Tide's applications, GMD asserts that they are different persons. We find Waddill's contention to be completely unsubstantiated and without merit and, therefore, we reject her contention.

[42] In addition, Waddill's attorney (Robert A. Burka (Burka)) states in a declaration that during the course of a telephone conversation, Visser's attorney indicated that he represented several limited partners in GMD who are not listed on GMD's applications for markets 316A, 384A, 559A, and 578A. Burka's statement concerning the alleged conversation is hearsay and, as such, provides insufficient grounds for an inquiry under Section 403 or a revocation proceeding under Section 312.

[43] *See* GMD I applications for market 384A and 578A (Arthur W. Schiff and Shawn Wisdom own a 2 and 4 percent non-voting interest in GMD I, respectively; Van Sciver owns a 2 percent voting interest in Palmcell).

[44] For the purpose of accepting applications and conducting lotteries for the 428 RSA cellular markets, the Commission divided the markets into five blocks. The Commission accepted applications and conducted lotteries for the markets in the following order of blocks: 2, 5, 3, 1, and 4. GMD I filed applications in each of the 79 markets composing Block 2. *See* GMD Reply to Third Supplement to Petition, Declaration of Gary Doyle. The filing windows for Block 2 applications closed on dates between July 13, 1988, and August 19, 1988.

[45] GMD I's application for market 559A, a Block 4 market, also reflects the conveyance of Gary Doyle's ownership interests to Arthur W. Schiff, Shawn Wisdom, and Van Sciver.

[46] *See Florida Cellular Mobil Communications Corporation*, 6 FCC Rcd 6910 (1991) (cellular non-wireline tentative selectee's application violated Section 22.922).

[47] *See* GMD I application for market 559A (as limited partners in Palmcell, both Lenoir Weeks and Huttenmayer hold a 2 percent ownership interest in GMD).

[48] *See* GMD minor amendment to application for market 559A (GMD minor amendment) (filed Dec. 8, 1989), Attachment B (Lenoir Weeks and Huttenmayer's "Assignment of Partial Interest in Palmcell General Partnership (RSA Block 4 Only)" agreements, dated Nov. 14, 1988, and Nov. 10, 1988, respectively) (the assignment agreements provide that Gary Doyle, prior to filing GMD's Block 4 applications, but after filing GMD's applications for Blocks 1, 2, 3, and 5, and "without affecting in any way his ownership interest in GMD's applications for RSA Blocks 1, 2, 3, and 5 or his ownership interest in Palmcell as such interest relates to the aforesaid RSA Blocks 1, 2, 3 and 5, [assigned to both Lenoir Weeks and Huttenmayer] . . . one [s]hare of his ownership interest in Palmcell as such ownership interest relates solely . . . to GMD's prospective applications for RSA Block 4. . .[, including market 559A], which [i]nterest represents . . .").

[49] Waddill also claims that in a February 28, 1992, amendment to GMD I's application for market 559A, "Huttenmayer's name suddenly disappears from the list of partners" in Palmcell in violation of Section 22.922 of the rules. Waddill Third Supplement to Petition at 8-9. In addition, Waddill claims that Walter McLaughlin (McLaughlin), Hubert Johnson (Johnson), and John Ferrari's (Ferrari) ownership interests decreased in GMD's application for market 559A in violation of Section 22.922 of the rules. *See* GMD I's application for market 559A (McLaughlin, Johnson, and Ferrari own 2, 2, and 4 percent non-voting interests

in GMD I, respectively); *cf.* GMD II's amendment to partnership agreement (dated Feb. 28, 1992), Attachment A (McLaughlin, Johnson, and Ferrari's non-voting ownership interests in GMD II decreased to 1, 1, and 2 percent, respectively). GMD avers that these changes "were permissible *post* -construction authorization grant changes . . . ." GMD Reply to Third Supplement to Petition at 17 (emphasis in the original). Section 22.922 of the rules prohibits alienation of interests in cellular applications "prior to the grant of a construction authorization." *See supra* note 8. Waddill submits no evidence which contradicts GMD's statement that the changes in ownership occurred after GMD I's construction authorization application was granted. Therefore, we find that the changes in Palmcell and GMD are permissible post-construction authorization changes. Accordingly, we find Waddill's claims to be without merit, and reject her contention.

[50] *See* Letter from GMD to MSD staff attorney at 2 (Feb. 19, 1992) (GMD avers that the amendments to GMD's partnership agreements "prevent the non-U.S. citizen limited partners from voting for the general partner's removal for any reason other than for cause, thereby conforming both [l]imited [p]artnership [a]greements to the requirements of *Continental Cellular*, FCC 91-355, 6 FCC Rcd 6834, released November 20, 1991"); *see also* Letter from GMD to MSD staff attorney (Feb. 28, 1992) (GMD avers that "both partnership agreements conclusively have been amended to prevent the non-U.S. citizen limited partners from voting for the general partner's removal for any reason other than for cause . . . .").

[51] Waddill Fourth Supplement to Petition at 2.

[52] In his letter to Sikes, Martin encloses a copy of correspondence from Irvin to Martin (*see infra)* and requests that Sikes "review[] th[e GMD] matter and furnish[him] . . . with a detailed report upon which [to]. . . base a reply to Mr. Irvin." Letter from Martin to Sikes (July 28, 1992). In his correspondence to Martin (which Martin forwarded to Sikes), Irvin states that "on October 28, 1991, . . . [Waddill] started a 'green mail' campaign against GMD. . [and that h]er abuse of the FCC process has interfered with GMD's ability to close on much needed financing. . . ." Letter from Irvin to Martin at 1 (July 15, 1992). Also, Irvin states that "[t]he financial impact on NY-1 is obvious. . . . because GMD had plans to add . . . cell sites[,] . . . to open an office[,] . . . and hire three employees . . . . [, and now] the Canadian cellular carrier[] is providing secondary coverage in the areas we were to cover. . . ." *Id.* at 2. In addition, Irvin states that he "estimate[s] the loss of local revenue, due to the FCC delay, to be approximately $2,000,000. . . ." *Id.* at 2. In closing, Irvin states that "we need FCC action now. It is to that end that we solicit you [sic] guidance and help in serving Northern New York. . . ." *Id.* at 2.

[53] In relevant part, Section 1.1202(b) of the rules defines a written presentation in a restricted proceeding as *ex parte* if it "is not served on the parties to the proceeding. . . ."

[54] *See also* 47 C.F.R. Section 1.1202(a) at note ("Any congressional or other communication expressing concern with administrative delay in a particular proceeding or expressing concern that a particular proceeding be resolved expeditiously, will be treated as a status inquiry . . . [*;p]rovided* [t]hat no view is expressed as to the merits or outcome of the proceeding; no view is expressed as to a date by which the proceeding should be resolved; and no specific reasons are given as to why the proceeding should be resolved expeditiously, other than the need to resolve administrative delay.").

[55] 47 C.F.R. Section 1.1210.

[56] *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, Report and Order*, 2 FCC Rcd 3011 at 3013 (1987).

[57] *See* 47 C.F.R. Section 1.1208(c)(1)(i).

[58] Waddill also contends that during a telephone conversation between GMD and an MSD staff attorney on February 18, 1992, GMD violated the *ex parte* rules. Waddill submits no evidence and the record contains no statements to support her contention. Therefore, we reject her contention. Further, Waddill asserts that on February 20, 1992, GMD's general manager "announced [to Waddill] that he . . . had talked to his 'source' at the Commission about this case and been advised that GMD would only get a monetary forfeiture, not a revocation hearing" in violation of the *ex parte* rules. *Id.* at 4. Again, Waddill's bald assertion is not supported by evidence and, therefore, we reject it.

[59] *Cf. Desert Empire Television Corp.*, 88 FCC 2d 1413 (1982); *cf. also Voice of Reason, Inc.*, 37 FCC 2d 686 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847 (Rev. Bd. 1973), *rev. denied*, FCC 74-476 (released May 8, 1974).

[60] *See Wilner*, 103 FCC 2d at 516-517.

[61] *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

[62] *See MCI Telecommunications Corporation*, 3 FCC Rcd 509, 514 (1988), *as supplemented*, 4 FCC Rcd 7299, *appeal dismissed by judgment sub nom. TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990); *cf. Pass Word, Inc.*, 76 FCC 2d 465 (1980), *affirmed*, 673 F.2d 1363, 1365 (D.C. Cir.), *cert. denied*, 459 U.S. 840.

[63] Citing *Continental Cellular*, 6 FCC Rcd 6834, 6840 n.24 (1991), *appeal docketed sub nom. Moving Phones Limited Partnership, L.P. v. FCC*, No. 91-1611, et al. (Dec. 18, 1991) (*Continental*), GMD asserts that the Commission has already determined that it will not take retroactive action against holders of final grants for violations of Section 310(b) of the Act and, therefore, may not now take any action against GMD's final grants in markets 384A, 559A, and 578A. *See Continental*, 6 FCC Rcd at 6836 and 6840 n.24, (after holding that the MSD erroneously allowed GTRW Partnership "to file an amendment [to its application] correcting the Section 310(b)(3) deficiency[,]" the Commission concluded that it would not "tak[e] any action on the original GTRW license or GTRW's successors in interest since that grant is now final."). The Commission's decision to impose sanctions and remedies for violations of the Act or our rules is discretionary, determined by the facts in the record of the case before it. We believe that in the subject case the violation of Section 310(b)(3) is of a sufficiently serious and continuing nature to warrant a sanction as well as remedial action. *See infra* discussion. We conclude that GMD's assertion interprets the Commisson's conclusion in *Continental* - where the problems had been corrected - too broadly and, therefore, must be rejected.

[64] *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991) ("willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law") (quoting H.R. Rep. No. 765, 97th Cong., 2d Sess. 51 (1982)); *see also MCI*, 3 FCC Rcd at 515 n.22 (1988) (MCI's unauthorized preconstruction is "willful ([because] it took the action involved) and repeated ([because] the violations were repeated over more than one day)"; *see also Pond Branch Telephone Co.*, 53 Rad. Reg. 2d 803, 804 (Com.Car.Bur. 1983) (operating a station before filing a license to cover is (1) a willful violation because the licensee knew he was operating the station, and (2) a repeated violation because it "occurred continually for a period of 72 days until . . . the license to cover was filed"); *see also Hale Broadcasting Corporation*, 79 FCC 2d 169, 171 (1980) (repeatedly "means simply more than once.").

[65] *See supra* para. 12; *see also* GMD I partnership agreement, signature pages of Arthur W. Schiff and Shawn Wisdom; *see also* Palmcell partnership agreement, signature pages of Van Sciver.

[66] In the *Policy Statement,* the Commission adopted base forfeiture amounts for a range of generic violations. However, the Commission expressly retained "discretion in situations that arise" and did not consider the *Policy Statement* to be a binding rule. *Policy Statement,* 6 FCC Rcd at 4695, *quoting Guardian Federal Savings & Loan Ass'n v. Federal Savings and Loan Insurance Co.,* 589 F.2d 658, 666 (D.C. Cir. 1978). In addition, the *Policy Statement* does not specifically provide a base forfeiture amount for violations of the alien provisions. Further, because violations of the alien restrictions are serious offenses, Section 310(b)(3) violations are not "miscellaneous violations" subject to the $5,000.00 base forfeiture amount under the *Policy Statement. See Policy Statement,* 6 FCC Rcd at 4695 (miscellaneous violations are deemed to encompass the relatively less grave offenses of the Act and rules).

[67] In calculating the forfeiture to impose on GMD, we only consider GMD's continuing violations of Section 310(b)(3) starting from one year prior to the issuance of this notice.

[68] *See* SICC, 2 FCC Rcd at 3339 (the Commission has "discretion in fashioning a remedy for a previous Section 310(b) violation.").

[69] Although GMD recently amended Section 12.1 of its partnership agreements to read that the alien limited partners may only vote for the removal of general partners for cause, GMD's amended partnership agreement do not adequately insulate its alien limited partners. *See* amendments to GMD I and GMD II's partnership agreement at 1-2 (effective Jan. 30, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-19

In re Applications of

TERESA G. BENNETT	File No. BPH-891109ME
SML COMMUNICATIONS, INC.	File No. BPH-891109MG

For Construction Permit for a
New FM Station on Channel 229A
in Ringgold, Georgia

Appearances

Stanley G. Emert, Jr., Esq. on behalf of Teresa G. Bennett; *Dan J. Alpert, Esq.* on behalf of SML Communications; and *Gary Schonman, Esq.* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: March 17, 1993; Released: March 26, 1993

I. PRELIMINARY STATEMENT

1. The captioned applications, along with others since dismissed, were designated for comparative hearing by *Hearing Designation Order*, 6 FCC Rcd 902 (Chief, Audio Services Div. 1991). The following issues were designated for comparative hearing:

1) To determine which of the proposals would, on a comparative basis, best serve the public interest.

2) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

2. Bennett filed a "Motion to Enlarge Issues Against SML Communication, Inc." on July 23, 1991. The motion was granted and by *Memorandum Opinion and Order*, FCC 91M-3187 (Nov. 7, 1991), the issues in this proceeding were enlarged as follows:

1. To determine whether SML was financially qualified at the time its application was filed;

2. To determine whether SML misrepresented facts to the Commission in certifying that it was financially qualified at the time it filed its application;

3. To determine whether SML had, and has, reasonable assurance of the availability of either of its proposed transmitter sites;

4. To determine whether SML misrepresented facts to the Commission in certifying that it had, and has, reasonable assurance of the availability of its proposed transmitter site;

5. To determine whether SML has engaged in a pattern of deceit, lack of candor and misrepresentations before the Commission; and

6. To determine in light of the evidence adduced under the forgoing issues, the effect on SML's basic qualifications to be a Commission licensee.

Issues 3 and 4 were disposed of by summary decision in favor of SML by *Memorandum Opinion and Order*, FCC 92M-396, released March 30, 1992.

II. FINDINGS OF FACT

A. Teresa G. Bennett

3. Bennett is an individual applicant. If awarded the construction permit, Ms. Bennett will be the general manager/sales manager of the station. Bennett Ex. 2. She will control all aspects of the station's business, including programming, sales, the hiring and firing of personnel, and community relations. Ms. Bennett will work in excess of forty hours per week at the station. She is presently employed at WQMT-FM, Chatsworth, Georgia, as the general sales manager. She will resign that employment to effectuate her integration commitment.

4. Bennett has been involved in the following civic activities within the predicted coverage contours of the proposed station:

1. Participated in the Murray County, Georgia, "Clean-up Campaign" in 1989.

2. Assisted with the annual "Cash for Kids" project, in conjunction with the Murray County Sheriff's Department and WQMT, from 1988 to 1990, soliciting items for fundraiser auctions.

3. Participated in an auction to raise funds to help area homeless people buy shelter and food through Harvest Outreach Ministries in February, 1991.

4. Participated in the Catoosa County (Ringgold) Jaycees "Haunted Depot," raising funds for charitable purposes, from 1986 to 1990.

5. Participated in Dalton Elks Club "Chicken-Q" fundraiser for an anti-drug abuse campaign from 1986 to 1990.

6. Assisted with the Special Olympics 4-H Club Rodeo, from 1988 to 1990.

7. Participated in a Muscular Dystrophy Association fundraiser in March, 1991.

8. Solicited donations from the American Legion food drive for the homeless of Dalton in February, 1991.

Ms. Bennett has not resided in the service area of the proposed station. Bennett Ex. 2.

5. Bennett was an account executive at WQMT-FM, Chatsworth, Georgia, from February 15, 1984 until September, 1987. From September, 1987 to the present, she has been the general sales manager of WQMT. Bennett Ex.

2. As such, she hires, trains, and manages a sales staff of four account executives. She assumes the duties of the general manager during the absence of the general manager. She has acted as the general manager continuously since about November 27, 1991, due to the fact that WQMT's owner and general manager also operates another business. Tr. 44-46. As the acting general manager, Bennett performs those duties normally associated with the duties of a general manager, and supervises as many as twelve employees. Bennett Ex. 2.[4]

6. Ms. Bennett will utilize an auxiliary power source at both her transmitter and studio sites to provide power in the event of commercial power outages. Bennett Ex. 4.

B. SML Communications, Inc.

7. SML is a Tennessee corporation. Ms. Cherri McIntyre, a black female, has subscribed to all of the voting stock of SML, representing 20% of the equity. The sole non-voting stockholder is Mr. Ralph Simpson. He owns 80% of the equity of the corporation.

8. From the time the corporation was formed until June, 1991, Mr. Simpson was SML's secretary and a director. Ms. McIntyre recalled that it was recommended by corporate counsel that Simpson be named as an officer and director:

> "... at the time this was done I was ... misled. The attorney told me that I needed a secretary. I said, 'Well, I don't have one.' Well, he said 'You can use [Mr. Simpson].' I hired him, I took his word, I did not know -- I did not know anything about all this legal stuff. It's just words on paper to me." Tr. 124-5.

Ms. McIntyre further testified that "... I assigned him to be the secretary and director at the same time because [corporate counsel] told me I could use his name. That is the only reason Ralph Simpson's name is on here as director and secretary." Tr. 126.

9. Mr. Simpson also testified that he was named corporate secretary because:

> "[i]n the initial set up, [corporate counsel] called me and asked me to be the secretary because somebody had to be the secretary of the corporation. And I told him it wouldn't be any problem, didn't even question anything about it or give any thought to it. It was maybe a two minute conversation. I said, "yes" and hung up the phone and went about my business." Tr. 339.

In 1991, Ms. McIntyre asked Mr. Simpson to resign the positions of secretary and director, upon learning from communications counsel that Simpson's non-voting equity interest stood to become attributable for integration purposes. Simpson did not engage in any corporate activities while nominally an officer and director.

10. Ms. McIntyre has discussed with Mr. Simpson the number of employees that the station might have. Tr. 225. From the time that the application was filed in November, 1989 until about July, 1991, McIntyre and Simpson conversed about SML matters two or three times each week. Tr. 227. Ms. McIntyre explained:

> "... a lot of facts about filing the application I was unaware of it. I plead ignorance to the fact and he was somebody I knew... But... I didn't feel like I had to rely on him to tell me what to do or to make a decision. And in this case as far as the radio station, he will not make any decisions. He is a non-voting and I make my own decisions. I've been in radio 24 years. I've been in and out of every department except being on the air. And a lot of times people talk to people just to be talking. It's like a sounding board. I mean, he was like a sounding board and you just talk. He could not have influenced me on that, there's no way." Tr. 225-6.

11. Ms. McIntyre will work full-time, a minimum of 40 hours per week, as the general manager of the proposed station. SML Ex. 2. She will be in charge of all aspects of the station's operations, including setting policy, hiring and firing personnel, and assuring compliance with all federal and local laws and regulations. She will directly supervise all station departments. Ms. McIntyre will resign her present employment and limit her involvement in civic activities and any other activity in which she may be engaged so as to be able to fulfill her integration commitment.

12. Ms. McIntyre has resided continuously within the service area of the proposed station since 1946. SML Ex. 2. Within that service area, McIntyre has participated in the following civic activities:

> 1. Active member of the Wesley Chapel Christian Community Church, apparently since sometime in the 1970's.
>
> 2. Active member of the American Women in Radio and Television, Chattanooga Chapter, from 1965 to 1969.
>
> 3. Active participant in voter registration drives of the Chattanooga African-American Voter Coalition in the years 1988, 1989 and 1990.

13. Since 1968, Ms. McIntyre has been employed at Station WNOO (AM), Chattanooga, Tennessee, or at co-owned Station WFXS-FM. SML Ex. 2. From 1968 to 1985, she was a receptionist and the Traffic Director at WNOO. From 1985, she was the Administrative Manager at WNOO. From 1988 to 1989, Ms. McIntyre was an Account Executive at WNOO; since 1989 she has been the Operations Manager and an Account Executive at WNOO, and since 1989 she has been the Operations Manager and an Account Executive at WFXS-FM.

14. SML will install auxiliary power at both its transmitter and studio locations so that it can remain on the air in the event of commercial power outages. SML Ex. 1.

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[4] SML's January 7, 1993 "Motion to Reopen the Record and to Enlarge the Issues Against Teresa G. Bennett" IS DENIED. Bennett's resignation from her employment at WQMT on June 16, 1992, long after the hearing record has been closed, is not a matter which could affect the ultimate disposition of this proceeding. *Omaha TV 15*, 4 FCC Rcd. 730 (1988).

Financial/Misrepresentation Issues

15. SML filed its application on November 9, 1989. The application was executed by Ms. Cherri McIntyre.

16. When Ms. McIntyre first learned of the Ringgold station opportunity, she spoke with a gentleman that she knew, Mr. Albert Woodard, about financial backing for the venture. SML Ex. 3. Mr. Woodard was unable to assist Ms. McIntyre, but he did advise her to seek financial help from Mr. Ralph Simpson or Mr. Ricky Cotton. Ms. McIntyre knew Simpson and Cotton from the time that the three of them worked at WNOO (AM) and WNOO-FM.

17. McIntyre later spoke with Mr. Simpson, explaining the radio station project to him and requesting his assistance with the necessary financing. About three weeks later, Simpson told McIntyre that he and Mr. Cotton would be willing to take care of the financing for the project. SML Exs. 3-4.

18. McIntyre claims she had no doubt that Simpson and Cotton could and would provide the funds. She knew that Simpson and Cotton were business partners in a certain software company and that the company was "very successful" "and obviously had some money." The company had an "impressive, spacious office in a nice building that had lawyers offices in it... [and the company] had many employees." She knew of Simpson's and Cotton's reputations as hard-working "prudent businessmen" who frequently talked about their "investments in different projects." She saw that "Cotton had a BMW and Ralph Simpson now has a Mercedes," and they "seemed to be people who had money." On the basis of it all, McIntyre had "no doubt" that Cotton and Simpson, and now Simpson alone, "could easily come up with the relatively small sum of $150,000." SML Ex. 3.

19. At the suggestion of Mr. Simpson, Ms. McIntyre retained Mr. Eric Reid as SML's consultant to assist in the preparation of SML's application. SML Ex. 3. SML's estimated cost for construction and initial operation of the station is $146,500. Ms. McIntyre prepared a budget in that amount and checked with Simpson to ascertain that Simpson and Cotton would cover that amount. SML Ex. 3, App. A; Ex. 4. Ms. McIntyre relied on Mr. Reid with respect to estimates of equipment costs.

20. Simpson informed McIntyre that he and Cotton would provide a total of $150,000. SML Exs. 3 and 4. According to Simpson, neither he nor Cotton ever intended to supply SML with their own funds. Instead, what Simpson had in mind was raising $150,000 from an outside source; Cotton would guarantee half of that amount and provide any collateral needed for that half, and Simpson would do the same respecting the other half. SML Ex. 4.

21. Simpson was satisfied of his ability to raise the necessary amount because, in the fall of 1989, he had been promised a loan for some business purpose in the amount of $150,000 by Dr. Thomas Brooks, an obstetrician/gynecologist practicing in Chattanooga, Tennessee. SML Ex. 6. McIntyre has never met Dr. Brooks, and has never discussed station financing with him. As a matter of fact, she was unaware of just how and where Simpson was intending to obtain the funding, and she made no inquiry in that regard. Tr. 149.

22. Having earlier told Ms. McIntyre that he and Cotton would provide a total of $150,000, Simpson then told SML's consultant, Mr. Reid, the same thing -- which Reid took to mean that each of them, Simpson and Cotton, would supply $75,000. SML Ex. 4.

23. Among the services provided to SML by Mr. Reid was the furnishing of a typed copy of the proposed application to Ms. McIntyre. SMl Ex. 3; Ex. 7. That typed copy reflected Reid's understanding that Simpson and Cotton were each proposing to supply SML with $75,000:

Ralph Simpson	$75,000
Ricky T. Cotton	$75,000
Cherri McIntyre	$ 500

24. Simpson's commitment letter to SML is dated November 1, 1989. Bennett Ex. 8. That letter, along with Simpson's balance sheet, was received by McIntyre before she executed the application. Tr. 151-2. Ms. McIntyre did not make an intelligent assessment of Simpson's balance sheet "because at that particular time I had – I basically did not know what I was doing...I was leaving everything up to Eric Reid... I was doing what he told me to do." Tr. 153. Because of a similar lack of comprehension by McIntyre, Reid's understanding of the proposed financial undertakings of Simpson and Cotton was incorporated directly into SML's application as filed.

25. In early 1990, Mr. Cotton "notified Cherri McIntyre that I wished to withdraw my financial commitment to SML ... since I had new family obligations." SML Ex. 5. Thereafter, Mr. Simpson agreed to assume, in addition to his own, the financing obligation thus shed by Mr. Cotton. SML Ex. 4. To reflect the new arrangement, Simpson sent SML a new letter "to supplement my letter of November 1, 1989 to you." Bennett Ex. 9. The letter is undated.

26. Ms. McIntyre relied on the November 1, 1989 letter in making SML's financial certification. Tr. 156; 162-3. That letter, by its terms, states Simpson's willingness to "secure" the necessary financing. It also requires SML to 1) provide the "lending sources" with a security interest in certain property; 2) pay a $6,000 "commitment fee" to Mr. Simpson; and 3) grant an eighty percent non-voting equity interest in SML to Mr. Simpson.

27. Ms. McIntyre testified that the eighty percent non-voting interest was intended to cover both Simpson *and* Cotton because, even though Cotton is not mentioned in the letter and the letter is signed only by Simpson, that is what she had been told by Simpson, i.e., that the letter had been written by Simpson on behalf of himself and Cotton. Tr. 164. SML did not agree to pay the $6,000 commitment fee. Tr. 156. Ms. McIntyre testified that she hopes to avoid having to pay that fee through negotiations with Mr. Simpson; if those negotiations are not successful, however, she would then be willing to pay the fee. Tr. 255.

28. Mr. Simpson's later undated commitment letter to Ms. McIntyre purports to confirm "what we discussed at the time of" the November 1, 1989, letter. Here, Simpson proposes to lend SML $146,000 in exchange for a security interest in station property, the payment to Simpson of a $3,000 commitment fee, and an eighty percent non-voting equity interest in SML.

29. SML's Exhibit 3, App. A, is the budget prepared by Ms. McIntyre. The budget contains no estimate for either a lease or purchase of a transmitter site. When SML's application was filed, the owner of the site was stated to be a Mr. Howell. At her deposition taken on July 1, 1991, McIntyre stated that she had made no decision on whether to buy or to lease that site. Bennett Ex. 23, p. 63. In fact, Ms. McIntyre did not know whether Howell was willing to lease or sell the property to SML. Bennett Ex. 22, p. 64. At the hearing, however, McIntyre stated that she knew that

SML was going to lease the land. Tr. 137. At her deposition, McIntyre stated that she did not know the cost to SML for either a lease or purchase of the property. At hearing, however, she stated that there was a $500.00 lease price. Bennett Ex. 23, p. 65; Tr. 141.

30. SML has proposed the use of auxiliary power generators at both the studio and transmitter sites. The cost of the generators was not included in the SML budget. Tr. 221. McIntyre does not know how much the generators will cost, but intends to pay for them out of the "Working Capital" portion of SML's budget. Tr. 222.

Pattern of Deceit/Misrepresentation

31. SML's application as originally filed indicated that McIntyre owned twenty shares of SML stock, Simpson owned thirty-five shares, and Cotton owned thirty-five shares -- for a total of ninety shares. McIntyre and Simpson subscribed to their shares by subscription agreements bearing the date of November 10, 1989. Bennett Exs. 12, 12. The record contains no subscription agreement of Ricky Cotton. Stock certificates bearing a date of "... this 10th day of November, 1989," were issued to McIntyre and Simpson. No stock certificate was ever issued evidencing Mr. Cotton's ownership even though, according to McIntyre, Cotton owned thirty-five shares at the time. Tr. 121, 129.

32. SML's corporate documents were prepared by a Chattanooga attorney, Jonathan Minnen. SML Ex. 10. A "Unanimous Written Consent of Board of Directors of SML Communications, Inc.," is stated to be "... effective this 10th day of November, 1989," and is signed by McIntyre and Simpson. Bennett Ex. 14. A "Unanimous Written Consent of Shareholders of SML Communications, Inc.," reflecting the election of the corporation's governing board and signed by McIntyre and Simpson, is stated to have been signed by them on November 5, 1990. Bennett Ex. 18. A "Unanimous Written Consent of Board of Directors of SML Communications, Inc.," reflecting the election of officers and signed by McIntyre and Simpson, is also stated to have been signed by them on November 5, 1990. Bennett Ex. 19. A "Unanimous Written Consent of the Board of Directors of SML Communications, Inc.," dated as effective November 10, 1989, reflects the adoption of certain resolutions by the corporation. Bennett Ex. 14. The document is signed by McIntyre and Simpson. Although the document is stated to be "effective" on November 10, 1989, it makes reference to the registration of the corporation's charter with the Hamilton County Register of Deeds on December 5, 1989, some four weeks after the effective date of the Unanimous Consent.

33. Jonathan Minnen explained the procedure he believes he followed in preparing SML's corporate documents. Thus, he was contacted by Mr. Cotton on November 8, 1989, and requested to form, on an expedited basis, a Tennessee corporation. SML Ex. 10. Minnen filed SML's charter with the Secretary of State on November 9, 1989, leaving the details of completing the remainder of the incorporation process to a later time. Minnen explains that under Tennessee law (T.C.A. § 48-12-103(a)), the corporate existence begins when the charter is filed with the Secretary of State. Therefore, it was not until January 8, 1990 that Minnen concerned himself with the remaining details of incorporation. Mr. Minnen, as did Ms. McIntyre, testified that, except for the corporate charter, no documents were finalized or executed before January 15, 1990. SML Ex. 10; Tr. 284-86; 251, 258-9. Mr. Minnen testified:

> "in conformity with my usual practice ... I was going to propose setting the 'effective' date of the documents as of November 10, 1989 because the charter needed to be filed on November 9, 1989. To my recollection, there was no other reason why I selected this date ... My recollection is that the was date acceptable [to SML] and the documents were subsequently prepared by me, bearing that date. To my recollection, there was no further discussion concerning what date I would use as the 'effective date' of the documents. Furthermore, to my recollection, the only date that was given to me by SML was the date by which the charter had to be filed. SML Ex. 10.
>
> [M]y usual practice is I will make the rest of the incorporated documents effective as of the time shortly after the charter . . . . so I suggested . . . 'well, I'll go ahead and make these effective the 10th; is that okay?' ... it was fine and so that's what I did. I don't recall any big discussion about dates at all other than the fact that the charter had to be filed on the 9th."

Tr. 286-87.

34. SML's income tax return for the year 1990 claimed that McIntyre owned ten percent of the stock of SML and Simpson owned ninety percent. Bennett Ex. 5. This tax return is dated July 11, 1991.

35. Ms. McIntyre answered "no" when asked if Mr. Simpson owned ninety percent of the stock in July 1991 when the tax return was signed, and "yes" when asked whether the ninety percent stock percentage specified in the return for Mr. Simpson was incorrect. Tr. 114-115. McIntyre also gave this testimony about the tax return:

> "I didn't write this and I didn't read it and the person that wrote that . . . why he put [a 90%-10% equity division] there I cannot answer to that . . . I thought I did [examine the return before signing it]. Obviously, I did not examine it thoroughly as I should have." Tr. 115.

The tax return was prepared by Ms. McIntyre's accountant who presented the return to her for signature. Tr. 249-50.

36. SML gave a "No" response to a question on the application form concerning whether any of the applicant's principals has been convicted of a felony. In his testimony, Mr. Simpson stated that he in fact had a felony conviction for having sold drugs during his college years, some nineteen years ago. Tr. 302-3. The fact of the conviction was unknown to Ms. McIntyre when SML's application was filed and did not become known to her until the time of the hearing in this case. Tr. 109.

III. CONCLUSIONS OF LAW

Qualifying Issues vs. SML Communications

A. Financial/Misrepresentation

37. In *Northampton Media Associates*, 4 FCC Rcd. 5517 (1989), the Commission enunciated the showing that an applicant must make to demonstrate that it is financially qualified:

> the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction ad operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing ... committed sources of funds. Where the lender is ... a person, ... the applicant must show that the person ... had the necessary financial resources [to provide the funds]....

38. SML's Exhibit 3, App. A, is the budget prepared by Ms. McIntyre. The budget contains no estimate for either a lease or purchase of a transmitter site. Similarly, the cost of the auxiliary power generators which SML proposes to employ is not included in the SML budget. Tr. 221. These missing items, while perhaps not fatal, detract from the adequacy of SML's budget.

39. Ms. McIntyre did not know whose money SML was to be receiving for the construction and initial operation of the proposed station. Mr. Simpson expected to obtain the money from a source unknown to Ms. McIntyre, Dr. Thomas Brooks. McIntyre has never met Dr. Books and has never discussed station financing with him.

40. Mr. Simpson was SML's source of funds. The commission's financial qualification standards require that, where an applicant's proposed "lender is not a financial institution but a person... the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time." *Northampton Media Associates, supra*, at 5519. Implicit in that formulation is the notion that an applicant's financial certification must be a "knowing" one, that is, that the applicant has taken reasonable steps to assure itself of the proposed lender's financial ability at the time of certification. *See, Aspen FM, Inc.*, 6 FCC Rcd. 1602, at 1603 ("... the applicant must demonstrate that it has taken the necessary steps to ascertain that the lender, when not a financial institution, has sufficient financial resources to meet his loan commitment at the time of certification....). SML had a duty to ascertain that Simpson had the necessary financial resources at the time McIntyre certified the applicant's financial qualification. SML did not do that. Instead, Ms. McIntyre allowed herself to be merely impressed by various general observations: Simpson and Cotton were business partners in a software company which had its "spacious office" in a "nice building" and the company appeared to be "very successful;" Cotton and Simpson had good reputations as "prudent businessmen" who often talked about their "investments;" Cotton and Simpson drove expensive automobiles and just "seemed to be people who had money." It was unreasonable of Ms. McIntyre to conclude, on the basis of these general observations, that Simspon and Cotton had, at the time she certified SML's financial qualification, the necessary financial resources.

41. Ms. McIntyre was apparently satisfied to proceed with nothing more than her generalized impression of Mr. Simpson's financial situation. Simpson's commitment letter to SML is dated November 1, 1989. That letter, along with Mr. Simpson's balance sheet, was received by McIntyre before she executed the application. The balance sheet meant nothing to her "because at that particular time I had -- I basically did not know what I was doing... I was leaving everything up to Eric Reid... I was doing what he told me to do." McIntyre made no intelligent assessment of Simpson's balance sheet. She testified that after receiving it, "I didn't do anything [with the balance sheet]." Tr. 153. SML was not financially qualified at the time it filed its application.

42. Misrepresentation is an intentional misstatement of fact intended to deceive. *Fox River Broadcasting, Inc.*, 53 RR. 2d 44 (1983). The record fails to show that SML ever attempted or intended to deceive the Commission regarding its financial qualification.

B. Pattern of Deceit/Misrepresentation

43. Bennett argues that SML 1) misrepresented its intended stock distribution in its application; 2) backdated certain corporate documents to conceal that misrepresentation; 3) failed to disclose in its application that its nonvoting shareholder, Mr. Simpson, had been convicted of a felony; and 4) filed a federal tax return which showed a different stock distribution for SML than that claimed by it in this proceeding. There is no intended deception in any of this.

44. SML's application as originally filed indicated that Ms. McIntyre owned twenty shares of SML stock, Mr. Simpson owned thirty five shares, and Mr. Cotton owned thirty five shares. McIntyre and Simpson subscribed to their shares by subscription agreements bearing the date of November 10, 1989. The record contains no subscription agreement of Mr. Cotton. Stock certificates bearing a date of November 10, 1989 were issued to McIntyre and Simpson. No stock certificate was issued evidencing Mr. Cotton's stock ownership even though, according to Ms. McIntyre, Cotton owned thirty five shares at the time.

45. On November 8, 1989, Mr. Cotton requested SML's local counsel, Jonathan Minnen, to form the corporation. The corporate charter was filed the next day, November 9, 1989, and on that same day SML's application was filed with the Commission.

46. A "Unanimous Written Consent of Board of Directors of SML Communications, Inc.," is stated to be "... effective this 10th day of November, 1989," and is signed by McIntyre and Simpson. A "Unanimous Written Consent of Shareholders of SML Communications, Inc.," reflecting the election of the corporation's governing board and signed by McIntyre and Simpson, is stated to have been signed by them on November 5, 1990. A "Unanimous Written Consent of Board of Directors of SML Communications, Inc.," reflecting the election of officers and signed by McIntyre and Simpson, is also stated to have been signed by them on November 5, 1990. A "Unanimous Written Consent of the Board of Directors of SML Communications, Inc.," dated as effective November 10, 1989, reflects the adoption of certain resolutions by the corporation. The document is signed by McIntyre and Simpson. As Bennett sees it, SML tried to overcome the withdrawal of Cotton by backdating these corporate documents:

> "The answer really lies in the fact that Cotton withdrew from SML... because he did not have the money to go forth. When Simpson found out that information some three (3) months after SML filed its application, SML's principals had to find some way to correct matters. The way it found was to backdate its corporate documents to reflect a change whereby only Simpson was in partnership with McIntyre."

47. Bennett's argument is rejected. The facts show that Mr. Cotton withdrew from the corporation in early 1990. None of the corporate documents on which Bennett rests her claim was in existence before January 15, 1990. By that time, Cotton had withdrawn; since he was no longer to be an SML owner, it was proper that Cotton's name not appear on the newly prepared corporate documents. Hence, no stock subscription agreement or stock certificate was ever prepared for Mr. Cotton. Ms. McIntyre testified at hearing that at the time the SML application was filed in November, 1989, Cotton was entitled to, and would have received, thirty five shares of SML stock if stock certificates had been issued at that time. As explained by Mr. Minnen, the backdating of the corporate documents was done by him simply as a matter of convenience; nothing about it even hints at attempted deception by SML.

48. Bennett charges SML, without any evidentiary support, with "trying to hide" the fact that its non-voting shareholder, is a convicted felon. SML gave a "No" response to a question on the application form concerning whether any of the applicant's principals has been convicted of a felony. On cross-examination, Mr. Simpson forthrightly stated that he in fact had a felony conviction for having trafficked in illegal drugs during his college years, some nineteen years ago. Ms. McIntyre, who executed SML's application, was wholly unaware of the conviction and did not learn of it until the time of the hearing in this case. No facts show that SML was "trying to hide" the fact of Mr. Simpson's felony conviction.

49. Finally, Bennett claims that SML knowingly "attempted to mislead" the Internal Revenue Service in an income tax return filed for the year 1990. That tax return indicated that Ms. McIntyre owned ten percent of SML's stock and Simpson owned ninety percent. Bennett offers no reason why SML would want to misrepresent its stock distribution to the Internal Revenue Service. The evidence merely shows that an error was made by SML's tax preparer in preparing SML's tax form and the error was not noted by Ms. McIntyre before she signed the form. This was no "attempt to mislead."

C. Standard Comparative Issue

50. SML is not financially qualified to become a Commission licensee. If this proceeding were to be determined on comparative considerations, however, the following conclusions would be pertinent.

51. Bennett, an individual applicant, would receive one hundred percent quantitative integration credit for her proposal to work full-time at the station as its general manager/sales manager.

52. Local residence and civic participation are not separate enhancement factors, but are considered together to determine which applicant has the greater likelihood of knowledge of and interest in the community. *Ronald Sorenson*, 68 RR 2d 1580. Since Bennett has not resided in the service area of the proposed station but has engaged in civic activities there, she receives a moderate enhancement of her integration proposal for civic participation. Bennett receives a slight enhancement for her broadcast experience, and a very slight enhancement for her proposal to utilize auxiliary power.

SML Communications, Inc.

53. The fact that non-voting shareholder Mr. Simpson was nominally an officer and a director of SML does not make his ownership interest attributable. The appointments were the results of unfortunate advice from counsel, were not sought by Mr. Simpson, and the appointments were ended when the error was discovered. Furthermore, the record does not show that Simspon engaged in any prohibited activity on behalf of the applicant while named as the corporation's secretary and as a director. As in *Coastal Broadcasting Partners*, 70 F.C.C. 2d 700 (1992), Simpson's ownership interest will not be attributed to the applicant.

54. SML would receive one hundred percent quantitative integration credit for Ms. McIntyre's proposal to work full-time at the station as its general manager. That integration proposal would be substantially enhanced because Ms. McIntyre is a member of a minority racial group. McIntyre's long-time service area residency and civic participation would warrant a moderate-to-substantial enhancement. Slight enhancement would be awarded for McIntyre's broadcast experience, and very slight enhancement for the proposal to utilize auxiliary power.

IV. ULTIMATE CONCLUSIONS

55. Teresa G. Bennett is fully qualified to be a Commission licensee. SML Communications, Inc., is not financially qualified. Accordingly, IT IS ORDERED that the Application of Teresa G. Bennett IS GRANTED, and the Application of SML Communications, Inc., IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

[5] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to § 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 19, 1993

FCC Suspends Semi-Annual Testing For Commercial Radio Operator Licenses And Establishes Interim Testing Procedures

In the past, the Commission has offered Commercial Radio Operator examinations on a regularly scheduled basis in cities where it has field offices. For the past several years, it has scheduled examinations only twice a year, usually in February and August. The Commission has also given examinations at other times when a license was required by Commission Rules for employment.

Because of budgetary constraints and the Commission's recent decision in FO Docket No. 92-206 to privatize the administration of examinations for commercial radio operator licenses, the Commission is suspending its regularly scheduled February Commercial Radio Operator testing sessions. Effective this date, the Commission will no longer accept applications to take a commercial radio operator examination. All such applications filed after today will be returned. A special interim procedure will be established for individuals who, by Commission Rule, must have a Commercial Radio Operator License for employment. These individuals may file a request with the Engineer-in-Charge (EIC) of one of the Commission's field offices for permission to apply for a special examination. In order to qualify for this special interim procedure, the individual must have a letter from an employer stating that he or she is already, or will be employed in a particular position where Commission Rules require a license, or present adequate evidence of self employment in a position where Commission Rules require a Commercial Radio Operator License. If the EIC determines that an individual qualifies to take the special examination, he or she will notify the individual that he or she may file an application to the Mellon Bank using a special fee code to be provided by the EIC. The field office will then administer and grade the special examination.

Although no February examination session was scheduled this year, approximately 1800 applications have already been filed in anticipation of such a session. To satisfy these requests and minimize Commission expenditures, the Commission has adopted a one-time interim procedure. The Commission's Field Operations Bureau (FOB) will mail out within ten days an examination package to those individuals with an application filed on or before the date of this Public Notice. The package will include an instruction sheet, a sealed copy of the requested examination, a blank answer sheet, a certification sheet, and a return self-addressed envelope. The applicant must take the sealed examination to a commercial operator licensee with an equal or higher class license than that sought and complete the examination before the licensee. The licensee must sign the certification sheet that the examination was opened in his or her presence and taken in his or her presence without the assistance of study guides or other aids. The licensee must then mail the completed answer sheet along with the certification sheet and the examination back to the Commission so it is received within 60 days of the date of this Public Notice. Those not received by this date will be dismissed without a fee refund.

This one-time interim procedure applies only to requests for written examinations for new commercial radiotelephone operator licenses received before the date of this Public Notice. Morse code and associated written examinations for radiotelegraph applicants who filed on or before the date of this Public Notice will be administered, upon the request of the applicant, by the Commission's field offices. Individuals who have pending applications for the radiotelegraph examination, however, will have their applications dismissed without a fee refund if, they do not request to take the written test within 60 days of this public notice.

Applications for renewals, duplicates or modifications of commercial operator licenses should continue to be sent to Mellon Bank with the $35 fee. The Commission waives any provisions in Parts 1 and 13 that are inconsistent with this interim procedure.

All inquiries concerning Commission examinations, *e.g.*, special examination locations and times, and interim examination procedures, should be addressed to the nearest Commission field office. A list of Commission field offices is attached. The Commission expects private examination sessions to be available to the public on a regular basis in the summer of 1993. A public notice will be issued when such sessions are available in place of the procedures set forth herein. Inquiries concerning the status of privatization should be addressed to the Private Radio Bureau at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

FCC OFFICE ADDRESSES

ALASKA, Anchorage Office
Federal Communications Commission
6721 Raspberry Road
Anchorage, Alaska 99502-1896
Phone: (907) 243-2153

*ARIZONA, Douglas Office
Federal Communications Commission
P.O. Box 6
Douglas, Arizona 85608-0006
Phone: (602) 364-8414

CALIFORNIA, San Diego Office
Federal Communications Commission
Interstate Office Park
4542 Ruffner Street, Room 370
San Diego, California 92111-2216
Phone: (619) 467-0549

*CALIFORNIA, Livermore Office
Federal Communications Commission
P.O. Box 311
Livermore, California 94551-0311
Phone: (510) 447-3614

CALIFORNIA, Los Angeles Office
Federal Communications Commission
Cerritos Corporate Tower, Room 660
18000 Studebaker Road.
Cerritos, California 90701-3684
Phone: (310) 809-2096

CALIFORNIA, San Francisco Office
Federal Communications Commission
3777 Depot Road, Room 420
Hayward, California 94545-1914
Phone: (510) 732-9046

COLORADO, Denver Office
Federal Communications Commission
165 South Union Blvd., Suite 860
Lakewood, Colorado 80228-2213
Phone: (303) 969-6497/8

*FLORIDA, Vero Beach Office
Federal Communications Commission
P.O. Box 1730
Vero Beach, Florida 32961-1730
Phone: (407) 778-3755

FLORIDA, Miami Office
Federal Communications Commission
Rochester Building, Room 310
8390 N.W. 53rd Street
Miami, Florida 33166-4668
Phone: (305) 526-7420

FLORIDA, Tampa Office
Federal Communications Commission
2203 N. Lois Avenue, Room 1215
Tampa, Florida 33607-2356
Phone: (813) 228-2872

GEORGIA, Atlanta Office
Federal Communications Comission
3575 Koger Blvd
Koger Center-Gwinnett, Room 320
Duluth, Georgia 30136-4958
Phone: (404) 279-4621

*GEORGIA, Powder Springs Office
Federal Communications Commission
P.O. Box 85
Powder Springs, Georgia 30073-0085
Phone: (404) 943-5420

HAWAII, Honolulu Office
Federal Communications Commission
P.O. Box 1030
Waipahu, Hawaii 96797-1030
Phone: (808) 677-3318

ILLINOIS, Chicago Office
Federal Communications Commission
Park Ridge Office Center, Room 306
1550 Northwest Highway
Park Ridge, Illinois 60068-1460
Phone: (312) 353-0195

LOUISIANA, New Orleans Office
Federal Communications Commission
800 West Commerce Road, Room 505
New Orleans, Louisiana 70123-3333
Phone: (504) 589-2095

*MAINE, Belfast Office
Federal Communications Commission
P.O. Box 470
Belfast, Maine 04915-0470
Phone: (207) 338-4088

MARYLAND, Baltimore Office
Federal Communications Commission
1017 Federal Building
31 Hopkins Plaza
Baltimore, Maryland 21201-2802
Phone: (410) 962-2728

*MARYLAND, Laurel Office
Federal Communications Commission
P.O. Box 250
Columbia, Maryland 21045-9998
Phone: (301) 725-3474

MASSACHUSETTS, Boston Office
Federal Communications Commission
1 Batterymarch Park
Quincy, Massachusetts 02169-7495
Phone: (617) 770-4023

*MICHIGAN, Allegan Office
Federal Communications Commission
P.O. Box 89
Allegan, Michigan 49010-9437
Phone: (616) 673-2063

MICHIGAN, Detroit Office
Federal Communications Commission
24897 Hathaway Street
Farmington Hills, Michigan 48335-1552
Phone: (313) 226-6078

MINNESOTA, St. Paul Office
Federal Communications Commission
693 Federal Bldg. & U.S. Courthouse
316 North Robert Street
St. Paul, Minnesota 55101-1467
Phone: (612) 290-3819

MISSOURI, Kansas City Office
Federal Communications Commission
8800 East 63rd Street, Room 320
Kansas City, Missouri 64133-4895
Phone: (816) 353-3773

*NEBRASKA, Grand Island Office
Federal Communications Commission
P.O. Box 1508
Grand Island, Nebraska 68802-1508
Phone: (308) 381-4721

NEW YORK, Buffalo Office
Federal Communications Commission
1307 Federal Building
111 West Huron Street
Buffalo, New York 14202-2398
Phone: (716) 846-4511

NEW YORK, New York Office
Federal Communications Commission
201 Varick Street
New York, New York 10014-4870
Phone: (212) 620-3437/8

OREGON, Portland Office
Federal Communications Commission
1782 Federal Building
1220 S.W. Third Avenue
Portland, Oregon 97204-2898
Phone: (503) 326-4114/5

PENNSYLVANIA, Philadelphia Office
Federal Communications Commission
One Oxford Valley Office Bldg, Room 404
2300 East Lincoln Highway
Langhorne, Pennsylvania 19047-1859
Phone: (215) 752-1324

PUERTO RICO, San Juan Office
Federal Communications Commission
US Federal Building, Room 747
Hato Rey, Puerto Rico 00918-1731
Phone: (809) 766-5567

TEXAS, Dallas Office
Federal Communications Commission
9330 LBJ Freeway, Room 1170
Dallas, Texas 75243-3429
Phone: (214) 235-3369

TEXAS, Houston Office
Federal Communications Commission
1225 North Loop West, Room 900
Houston, Texas 77008-1775
Phone: (713) 861-6200

*TEXAS, Kingsville Office
Federal Communications Commission
P.O. Box 632
Kingsville, Texas 78364-0632
Phone: (512) 592-2531

VIRGINIA, Norfolk Office
Federal Communications Commission
1200 Communications Circle
Virginia Beach, Virginia 23455-3725
Phone: (804) 441-6472

*WASHINGTON, Ferndale Office
Federal Communications Commission
1330 Loomis Trail Road
Custer, Washington 98240-9303
Phone: (206) 354-4892

WASHINGTON, Seattle Office
Federal Communications Commission
11410 NE. 122nd Way, Suite 312
Kirkland, Washington 98034-6927
Phone: (206) 821-9037

*Licenses and examinations are not available at * locations

03/01/93

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 19, 1993

COMMENTS INVITED ON NORTH DAKOTA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for North Dakota (Region 32).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 32 consists of the state of North Dakota. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 28, 1993** and reply comments on or before **May 13, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-77 North Dakota-Public Safety Region 32.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 19, 1993

COMMENTS INVITED ON SOUTH CAROLINA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for South Carolina (Region 37).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 37 consists of the state of South Carolina. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 28, 1993** and reply comments on or before **May 13, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-78 South Carolina-Public Safety Region 37.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

800 Data Base Access Tariffs

ORDER

Adopted: March 16, 1993; Released: March 16, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 1, 1993, most local exchange companies filed tariffs offering 800 data base access services. Petitions to reject or suspend these tariffs are due on March 16, 1993. On March 15, 1993, the Ad Hoc Telecommunications Users Committee, the National Data Corporation, the California Bankers Clearing House Association, MasterCard International Incorporated, the New York Clearing House Association, and Visa, U.S.A., Inc., jointly filed a petition for extension of time, requesting that the Commission extend the deadline for filing these oppositions until the close of business on March 18, 1993. Ad Hoc states that this additional time is necessary because a major snowstorm caused the parties to lose two very important days of work from "an already very tight pleading cycle."

2. The Division has reviewed the petitioners' request for extension of time and has determined that good cause has been shown to grant all interested parties additional time, until March 18, 1993, to file petitions to reject or suspend the above-referenced tariffs. Further, the Division, on its own motion, will extend the deadline for filing replies in this proceeding until March 23, 1993.

3. This decision does not affect the filing deadlines for petitions relating to 800 data base tariffs which were filed on March 5, 1993 by local exchange carriers who do not own their own service control points. *See* Provision of Access for 800 Service, CC Docket No. 86-10, DA 93-202, (released Feb. 22, 1993). It also does not affect the filing deadlines for petitions relating to the 800 Service Management System tariff filed on March 5, 1993 by the Bell Operating Companies.

4. Accordingly, IT IS ORDERED that the petition for extension of time filed by the Ad Hoc Telecommunications Users Committee, the National Data Corporation, the California Bankers Clearing House Association, MasterCard International Incorporated, the New York Clearing House Association, and Visa, U.S.A., Inc. IS GRANTED, to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

800 Data Base Access Tariffs

ORDER

Adopted: March 18, 1993; Released: March 18, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 16, 1993, the Tariff Division issued an order granting a jointly filed petition for extension of time in which to file petitions for rejection or suspension of the above-referenced tariffs. *See* 800 Data Base Access Tariffs, DA 93-316 (released Mar. 16, 1993). That petition was filed by the Ad Hoc Telecommunications Users Committee, the National Data Corporation, the California Bankers Clearing House Association, MasterCard International Incorporated, the New York Clearing House Association, and Visa, U.S.A., Inc.

2. The March 16, 1993 order, in accordance with Section 1.773(b)(ii) of the Commission's Rules, 47 C.F.R. § 1.773(b)(ii), allowed five days for filing replies relating to the above-referenced tariffs. The Division hereby clarifies that, in accordance with Section 1.773(b)(2), 47 C.F.R. § 1.773(b)(2), the deadline for filing replies to petitions against the data base 800 tariffs is March 29, 1993.

3. Accordingly, IT IS ORDERED that the above-referenced March 16, 1993 order is clarified as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-205

In Re Applications of

RADIO LAKE GENEVA CORPORATION — File No. BPH-900611MG

TOM KWIATKOWSKI — File No. BPH-900613MA

For Construction Permit for a
New FM Station on Channel 241A
in Lake Geneva, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1993; Released: March 26, 1993

By the Commission:

1. The Commission has under consideration an Application for Review (Application) filed by Radio Lake Geneva Corporation (RLGC) on October 5, 1992 seeking reversal of the Review Board's *Decision* (7 FCC Rcd 5586 (Rev. Bd. 1992)) in this proceeding. The Board affirmed the *Initial Decision* (7 FCC Rcd 1388 (ALJ 1992)(*I.D.*) of the Administrative Law Judge (ALJ) awarding Tom Kwiatkowski (Kwiatkowski) the construction permit for a new FM station in Lake Geneva, Wisconsin.[1] We agree with the Board's resolution of this proceeding. However, several matters warrant brief comment.

2. In conjunction with its argument that Kwiatkowski did not show good cause for an amendment reducing the height of its proposed tower in response to the FAA's August 28, 1991 air hazard determination,[2] RLGC argues that the rulings below accepting Kwiatkowski's amendment and granting summary decision on an air hazard issue are inconsistent with past cases where transmitter site amendments have been rejected.[3] In contrast to those cases, precedent establishes that an applicant dealing with the FAA need not "switch rather than fight," and we agree with the Board that Kwiatkowski's dealings with the FAA in this case were sufficiently reasonable, prudent and diligent to establish good cause for his amendment reducing his tower height to meet the FAA's concerns. 7 FCC Rcd at 5589-90 ¶ ¶ 13-14.[4]

3. RLGC also claims that the integration criterion is no longer valid, citing *Susan M. Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992). In this regard, RLGC contends that, when Kwiatkowski is deprived of this advantage, its own application is "in a prime position to be granted." Application for Review at 10. We disagree. In contrast to *Bechtel*, RLGC does not argue that its non-integrated proposal would serve the public interest as well as, if not better than, if it proposed integration. In any event, RLGC's general reliance on *Bechtel*, standing alone, provides no basis for overturning the Board's *Decision*. See *Anchor Broadcasting Limited Partnership*, 8 FCC Rcd _____ (1993).

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(i), the Application for Review filed October 5, 1992 by Radio Lake Geneva Radio Corporation IS DENIED.

5. IT IS FURTHER ORDERED, That the Motion to Strike Non-Record Material filed October 28, 1992 by Radio Lake Geneva Corporation IS DISMISSED, and that the Motion to Reopen the Record filed November 23, 1992 by Tom Kwiatkowksi IS GRANTED, as reflected herein.

6. IT IS FURTHER ORDERED, That the application of Tom Kwiatkowksi (File No. BPH-900613MA) for a construction permit for a new FM broadcast station on Channel 241A at Lake Geneva, Wisconsin IS GRANTED, and the application of Radio Lake Geneva Corporation (File No. BPH-900611MG) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Also under consideration is an Opposition to the Application for Review filed by Kwiatkowski on October 20, 1992, a Motion to Strike Non-Record Material filed by RLGC on October 28, 1992, and a Motion to Reopen the Record filed by Kwiatkowski on November 23, 1992.

[2] Kwiatkowski's Motion to Reopen the Record submits the FAA's October 28, 1992 No Hazard to Air Navigation determination concerning Kwiatkowski's original 220 foot tower proposal. Kwiatkowski's motion will be granted to the extent of accepting his submission for reporting purposes under 47 C.F.R. § 1.65.

[3] RLGC relies on *Goodlettsville Broadcasting Company, Inc.*, 5 FCC Rcd 4593 (1990), where the applicant specified a short-spaced site, but, rather than curing or contesting the short-spacing determination, initially relied on engineering guidelines for directional antennas that were not yet effective and only sought to amend to a fully spaced site six months later; and *National Communications Industries*, 6 FCC Rcd 1978 (Rev. Bd. 1991) rev. den. 7 FCC Rcd 1703 (1992), where the applicant, after learning that its proposed site had been sold, took no steps to obtain permission to use the site from the new owner and waited until it was notified, at least six months later, that the site was unavailable to propose an amendment of its transmitter site. Accord *Eugene Walton*, 6 FCC Rcd 6071, 6074-75 ¶ ¶ 14-17 (Rev. Bd. 1991), rev. den. 7 FCC Rcd 3237 (1992), where the applicant, rather than immediately remedying a short-spacing problem upon learning of it, did not submit a curative amendment until more than ten months later after its clearly deficient waiver request was denied.

[4] RLGC's assertion that the Board's statement, 7 FCC Rcd at 5589 ¶ 14, that Kwiatkowski submitted a supplemental showing, is unsupported by record evidence is frivolous in light of the clear efforts by Kwiatkowski to obtain a modification of the FAA's preliminary adverse determination. 7 FCC Rcd at 5586-87 ¶ ¶ 4-6. Similarly, RLGC's request before the Board and again here to strike a statement in Kwiatkowski's pleadings concerning a comparative coverage preference based on his original tower proposal, which is merely an argument of counsel having no bearing on the good cause finding for Kwiatkowski's amendment, warrants no action.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 86-337

In the Matter of

An Automatic Transmitter
Identification System for Radio
Transmitting Equipment

ORDER

Adopted: February 25, 1993; Released: March 26, 1993

By the Commission: Commissioner Marshall not participating.

1. By this Order General Docket No. 86-337 is terminated. In a Notice of Proposed Rule Making and Notice of Inquiry, adopted August 7, 1986, the Commission instituted a proceeding to establish a means by which all radio emissions might be encoded with a distinct automatically transmitted identifier.[1] The NPRM/NOI proposed rules related to video satellite uplink stations and sought comment regarding other radio services. The Commission subsequently sought further comment on a proposed system for video satellite uplink signals.[2] On April 13, 1990, the Commission adopted a First Report and Order implementing an automatic transmitter identification system (ATIS) for video satellite uplinks.[3] The portion of the NPRM/NOI related to radio services other than satellite remains outstanding. Comments were filed, however, the commenters provided no consensus on how to proceed and the record is now stale.

2. A variety of proprietary ATIS methods are now marketed and, for example, in the marine service, ATIS is effectively part of internationally recognized digital selective calling. Thus, we believe that ATIS is being developed and implemented absent Commission mandate. Further, during the time frame in which these new identification techniques are developing, progess in decoding methods is also moving forward. Digital signal processing techniques now make it possible to analyze a variety of coded signals.

3. In view of these developments, the public interest would best be served by discontinuing this rule making. Accordingly, It Is Ordered that General Docket No. 86-337 is hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] In the Matter of An Automatic Transmitter Identification System for Radio Transmitting Equipment, Notice of Proposed Rule Making and Notice of Inquiry, Gen Dkt No. 86-337, FCC 86-356, released August 19, 1986.

[2] In the Matter of An Automatic Transmitter Identification System for Radio Transmitting Equipment, Further Notice of Proposed Rule Making, 2 FCC Rcd 4036 (1987).

[3] In the Matter of An Automatic Transmitter Identification System for Radio Transmitting Equipment, First Report and Order, 5 FCC Rcd 3256 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 26, 1993

APPLICATION FILED PURSUANT TO SECTION 62.1 OF THE COMMISSION'S RULES

EID 689 Robert J. Ranalli

Applicant seeks authorization to serve as an officer and director of both American Telephone and Telegraph Company and McCaw Cellular Communications, Inc.

Comments on the above application should be addressed to the Enforcement Division, Common Carrier Bureau within ten days of the release of this public notice. The application may be inspected at 1250 23rd Street, N.W., Plaza Level, Washington, D.C. 20554. Questions should be directed to Jeff Hertz, (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Canal 48, Inc.,
(Assignor)

and File No. BALCT-910313KE

International Broadcasting
Corporation,
(Assignee)

For Consent to Assignment of
the License of WIEC(TV), Channel 48
Ponce, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1993; Released: March 22, 1993

By the Commission: Commissioner Marshall not participating.

1. The Commission has before it for consideration the unopposed application to assign the license of television station WIEC, Channel 48, Ponce, Puerto Rico, from Canal 48, Inc. to International Broadcasting Corporation ("IBC"). IBC, whose sole stockholder is Pedro Roman Collazo, is the licensee of television broadcast station WSJU, Channel 18, San Juan, Puerto Rico. Mr. Roman is likewise the sole stockholder of Southwestern Broadcasting Corporation ("SBC"), the licensee of WVEO(TV), Channel 44, Aguadilla, Puerto Rico. The Grade B contours of WSJU and WVEO do not overlap. The acquisition of WIEC will result in WIEC's predicted Grade B contour overlapping those of WVEO and WSJU.[1] Section 73.3555 (a)(3) of the Commission's rules generally prohibits common ownership or control of television stations with overlapping Grade B contours. Mr. Roman intends, however, to operate WIEC primarily as a satellite of WSJU pursuant to the satellite exception to the duopoly prohibition set forth in Note 5 to Section 73.3555(a)(3) of the Commission's rules.[2] WVEO now receives its programming from WSJU.[3]

2. Under our satellite policy, *Television Satellite Stations*, 6 FCC Rcd 4212 (1991), an applicant for television satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if it meets three criteria: (1) there is no City Grade contour overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area;[4] and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis to determine whether a grant of the application is in the public interest.

3. In support of its request that WIEC be permitted to operate as a satellite of WSJU, the applicant contends that its proposal meets the three criteria for presumptive grant. First, there is no overlap between the City Grade contours of stations WSJU and WIEC. Second, the applicant admits that WIEC's area of service is not underserved according to the Commission's strict definition, but it argues that the five television stations licensed to Ponce are not truly local and do not focus on Ponce and its surrounding area. The applicant concludes that the area should therefore be considered underserved. Third, the applicant argues that there is no party willing and able to purchase WIEC and operate it on a stand-alone basis because of the station's long-standing financial difficulties and because of the overall economic depression in Puerto Rico.

DISCUSSION

4. With regard to the first criterion of the public service presumption, the applicant has submitted an engineering study which demonstrates that the present City Grade contours of WSJU and WIEC will not overlap. Further, while IBC holds a construction permit (File No. BPCT-910920KQ) to relocate the WSJU transmitter, its engineering study further demonstrates that the new proposed City Grade contour of WSJU will not overlap with the City Grade contour of WIEC. Also, there is no overlap between the City Grade contours of WIEC and WVEO.

5. There are five other television stations (four commercial and one noncommercial) licensed to Ponce and more than four television services received in over 25% of that area within WIEC's Grade B contour which is outside its proposed parent's (WSJU's) Grade B contour. Further, existing satellite stations count for the purpose of determining the number of available television services under our satellite policy. Accordingly, the applicant does not meet the second criterion for a presumptive grant.

6. With respect to the third criterion to qualify for a presumptive grant, Canal 48 admits that it did not list the station for sale. The applicant states that, given WIEC's history, it seems unlikely that any potential buyers would be willing to assume control of the station and operate the station as a stand-alone, full-service facility. It notes that the station has been dark for more than three years, that

[1] WVEO in Aguadilla was authorized previously as a satellite. *See Hector Nicolau*, 5 FCC Rcd 6370 (1990). At that time, Mr. Roman was attempting to acquire television station WTIN in Ponce which would provide the programming for and be the parent of WVEO. The acquisition of WTIN was not consummated. Subsequently, Mr. Roman acquired WSJU in San Juan, and WVEO now operates as a satellite of WSJU.

[2] We note that there is an outstanding proceeding concerning television satellite stations that invites comment on whether television satellites should continue to be exempted from the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in Docket No. 87-8, 6 FCC Rcd 5010 (1991).

[3] A station that obtains and rebroadcasts all of its programming from its parent is referred to as a "100% satellite," whereas a satellite station that originates some local programming is referred to as "primarily a satellite" station. *See Amaturo Group, Inc.*, 68 FCC 2d 899, 900(1978); *Television Satellite Stations*, 6 FCC Rcd 4212 (1991).

[4] We have defined an "underserved area" as one in which there are two or fewer stations licensed to the satellite's community of license, or, alternatively, one in which 25% or more of the area within the satellite's Grade B contour and outside the parent's Grade B contour receives four or fewer television services. *See Television Satellite Stations*, above, at 4215.

prior to going dark the station received its programming from a separately owned station that has since gone into bankruptcy,[5] and that historically the station has never been able to support even "nominal" operations. In light of the depressed economic conditions in Puerto Rico, Canal 48 argues that it would be a futile exercise to list the station for sale. Canal 48 states that, with the help of IBC, it attempted to return WIEC to the air in 1991 but experienced technical difficulties that once again caused the station to go dark. Finally, Canal 48 notes that, since going dark, the only offer the company has received to purchase WIEC is the offer contained in the application before the Commission.

7. While the applicant does not fulfill the requirements of criteria two and three for a presumptive grant, we find that a persuasive showing has been made to justify satellite operation under an *ad hoc* analysis. In the past, the Commission has recognized not only the unusual economic circumstances but also the unique and extreme topography in Puerto Rico as legitimate bases for authorizing satellite operations.[6] Puerto Rico is a highly concentrated broadcast market having more than 100 radio stations and more than 30 licensed or authorized television stations, with San Juan dominating the island's economy. Puerto Rico, as an island, is approximately 125 miles long (east to west) and thirty miles wide (north to south), bisected east to west by a central mountain range which effectively blocks television signals directed across its heights. WIEC, located in Ponce, is on the south coast and therefore on the opposite side of the central mountain chain from WSJU in San Juan. WVEO, in Aguadilla, is at the northwest corner of the island. As the applicant points out, while there is predicted Grade B contour overlap between WIEC and WVEO and WSJU, the area between the stations is mountainous, and none of the stations is likely to be received much beyond their immediate communities of license. In fact, we have previously determined that useful television service for stations in Puerto Rico usually does not extend beyond the Grade A contour and is sometimes not satisfactory within that area. *See Channel 7, Puerto Rico*, 58 FCC 2d 1148, 1151 (1975). We note that to the extent that there is predicted Grade B overlap between WIEC and WSJU and WIEC and WVEO, the overlap is consistent with those satellite operations we approved in the past.

8. There is a public interest benefit from the additional service that will be provided by the station, even though it will operate primarily as a satellite. In that regard, we note that all of the stations licensed to Ponce, with the exception of VHF station WSTE, Channel 7, operate as satellites or operate pursuant to rebroadcast agreements (essentially functioning as non-commonly owned satellites).[7] For example, WSUR, Channel 9, and WKPV, Channel 20, are satellites of San Juan stations. Both WTIN, Channel 14, and WQTO, Channel 26 (a noncommercial educational station) are satellites of Fajardo stations. Thus, it appears that satellite operations or rebroadcast arrangements are essential to the provision of programming choices to Ponce, a community that is effectively isolated from the island's economic center in San Juan. Allowing WIEC to come into operation as a satellite station will thus increase the possibilities for program choice in Ponce.

9. Finally, we note that WIEC has been dark for more than three years, unable to operate as a stand-alone facility after its parent station went into bankruptcy. In fact, WIEC's equipment had been repossessed to satisfy creditors' liens. Given the financial history of the station and its longtime dark status, we are persuaded that requiring the applicants to offer the station for sale as a full-service, stand-alone facility would be a futile exercise.

10. In summary, while independent ownership and operation of WIEC might lead to greater diversity of viewpoints, we cannot ignore this station's history. It appears unlikely that WIEC will be restored to the air in the near future as a stand-alone facility. We believe that the surest way to provide an additional choice of programming for the residents of Ponce is approval of this satellite proposal. Thus, we find under the *ad hoc* approach that satellite operation for WIEC has been justified.

CONCLUSION

11. In view of the above, we conclude, having found that the applicant is fully qualified in all other respects, that a grant of the application would serve the public interest, convenience, and necessity. However, in view of the fact that other full-service stations are licensed to Ponce, we will require WIEC to establish a studio within eighteen months of commencement of operations and to originate some local programming. *See, e.g., Telemundo, Inc. v. FCC*, 802 F.2d 513, 517-18 (D.C. Cir. 1986)(noting the Commission's grant of another satellite operation in Ponce, conditioned on the establishment of a studio).

12. Accordingly, IT IS ORDERED, That the application (BALCT-910313KE) for consent to assign the license of television station WIEC, Ponce, Puerto Rico, from Canal 48, Inc. to International Broadcasting Corporation, IS GRANTED, subject to the following condition:

> The licensee will establish a main studio and commence origination of some local programming no later than 18 months after television station WIEC starts operating.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[5] WIEC had been receiving its programming from separately owned station WRWR-TV, Channel 30, San Juan, Puerto Rico, until that station went into bankruptcy and its equipment was taken in satisfaction of a lien by RCA. WIEC was thus left without a source of programming and having no originating equipment of its own, was unable to operate as a stand-alone facility.

[6] *See Hector Nicolau*, above.

[7] We note that while WSTE does not operate as a satellite, it does operate as a system of multiple cochannel transmitters (simultaneously broadcasting), precisely because of the difficulty of providing service in such mountainous terrain. *See Siete Grande Television, Inc.*, 7 FCC Rcd 5299 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 22, 1993

COMMENTS INVITED ON WEST VIRGINIA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for West Virginia (Region 44).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 44 consists of the state of West Virginia. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 29, 1993** and reply comments on or before **May 14, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-79 West Virginia-Public Safety Region 44.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 22, 1993

COMMENTS INVITED ON HAWAII PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Hawaii (Region 11).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 11 consists of the state of Hawaii. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 29, 1993** and reply comments on or before **May 14, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-80 Hawaii-Public Safety Region 11.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-195

In the Matter of

Amendment of Section 73.202(b),	RM-7091
Table of Allotments,	RM-7146
FM Broadcast Stations.	RM-8123
(Beverly Hills, Chiefland,	RM-8124
Holiday, Micanopy and	
Sarasota, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 9, 1993; Released: March 29, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills, Florida, and the modification of the construction permit of Station WXOF (formerly WPDS), Beverly Hills, Florida, to specify operation on Channel 246C3, 7 FCC Rcd 5910 (1992). Sarasota-FM, Inc. and Gator Broadcasting Corporation ("Sarasota-FM/Gator") filed joint comments and reply comments.[2] Heart of Citrus, Inc. ("Heart of Citrus"), permittee of Station WXOF, filed comments and reply comments. Pasco Pinellas Broadcasting Co. ("Pasco Pinellas"), Highlands Media Company, Inc., Roper Broadcasting, Inc., WGUL-FM, Inc., and White Construction Co., Inc. filed reply comments. For the reasons discussed below, we are upgrading Station WXOF, Beverly Hills, Florida, to Channel 292C3; Station WRRX, Micanopy, Florida, to Channel 247C2; Station WLVU, Holiday, Florida, to Channel 246C2; and Station WSRZ, Sarasota, Florida, to Channel 293C2. In order to accommodate these action, we are also modifying the construction permit of Station WLQH, Channel 247A, Chiefland, Florida, to specify operation on Channel 300A.

Background

2. This proceeding began with the filing of a petition for rule making by Heart of Citrus, permittee of Station WXOF, Beverly Hills, Florida, proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills, and modification of its construction permit to specify operation on Channel 246C3. In response to the *Notice*, we received two counterproposals.[3] The first was filed jointly by Sarasota-FM/Gator. That counterproposal proposed an alternate substitution of Channel 292C3 for Channel 246A at Beverly Hills; the alternate substitution of Channel 246C2 for Channel 292A at Holiday, Florida, and modification of the license of Station WLVU, Holiday, to specify operation on Channel 246C2;[4] and the substitution of Channel 300A for Channel 247A at Chiefland, Florida, and modification of the construction permit of Station WLQH, Chiefland, to specify operation on Channel 300A. In turn, these channel substitutions would permit the substitution of Channel 293C2 for Channel 292A at Sarasota, and modification of the license of Station WSRZ to specify operation on Channel 292C2; and the substitution of Channel 247C2 for Channel 249A at Micanopy, and modification of the license of Station WRRX to specify operation on Channel 247C2. The second counterproposal was filed by Heart of Citrus proposing the substitution of Channel 246C2 for Channel 246A at Beverly Hills, and modification of its construction permit to specify operation on Channel 246C2.

Beverly Hills, Florida

3. There are three Beverly Hills upgrade proposals before us. The first two, Channel 246C3 and Channel 246C2, were advanced by Heart of Citrus. The third proposal, Channel 292C3, was advanced by Sarasota-FM/Gator.[5] A Channel 292C3 upgrade at Beverly Hills instead of Channel 246C2 or Channel 246C3 would accommodate the Channel 247C2 upgrade at Micanopy and the Channel 246C2 upgrade at Holiday. In turn, a Channel 246C2 upgrade at Holiday makes possible the Channel 293C2 upgrade at Sarasota. On the other hand, any upgrade on Channel 246 at Beverly Hills precludes upgrades at both Micanopy and Sarasota. As a consequence, it is necessary to consider the public interest benefits of a Class C2 upgrade at Beverly Hills versus the proposed upgrades at Micanopy and Sarasota. These conflicting proposals are comparatively considered under the Commission's guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In comparing conflicting proposals, the priorities are as follows:

(1) First full-time aural service

(2) Second full-time aural service

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[1] The communities of Chiefland, Holiday, Micanopy and Sarasota, Florida, have been added to the caption.

[2] Sarasota-FM, Inc. is the licensee of Station WSRZ, Channel 292A, Sarasota, Florida, and Gator Broadcasting Corporation is the licensee of Station WRRX, Channel 249A, Micanopy, Florida.

[3] Public Notice was given on November 20, 1992 (Report No. 1918).

[4] In MM Docket No. 87-455, we are currently considering a Channel 292C2 upgrade for Station WLVU.

[5] As noted earlier, Sarasota-FM/Gator proposed the Channel 292C3 upgrade at Beverly Hills in conjunction with a Channel 246C2 upgrade at Holiday, Florida (instead of the Channel 292C2 upgrade being considered for Station WLVU in MM Docket No. 87-455). With respect to Beverly Hills and Holiday, this proposal is an "incompatible channel swap" as envisioned in *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channel*, 60 RR 2d 114,120 (1986). *See Holiday, Florida*, 7 FCC Rcd 2557 (1992); *see also Clincho, Virginia* 6 FCC Rcd 3732 (1991). As such, these nonadjacent channel upgrades may be granted without opening either proposed upgraded allotment to other expressions of interest.

(3) First local service

(4) Other public interest matters

(Co-equal weight is given to priorities (2) and (3))

4. A Class C3 facility at Beverly Hills will serve approximately 198,750 persons. Compared to the existing Class A authorization of Station WXOF, this represents a net gain of 89,966 persons. On the other hand, the proposed Class C2 upgrade at Beverly Hills will serve approximately 322,428 persons representing a net gain of 213,636 persons. In regard to the population receiving additional service, Heart of Citrus claims that a Class C2 upgrade at Beverly Hills will provide a third aural service to 2,162 persons and a fourth aural service to 8,005 persons. In contrast, a Class C3 upgrade will provide a third aural service to 2,162 persons and a fourth aural service to only 7,443 persons. In comparison, the proposed upgrade for Station WRRX at Micanopy will provide a net service gain of 117,867 persons and the proposed upgrade for Station WSRZ at Sarasota will provide a net service gain of 773,448 persons.

5. After careful consideration of this matter, we believe that the public interest would be best served by upgrading Station WXOF, Beverly Hills, Florida, to specify operation on Channel 292C3.[6] A Class C3 upgrade at Beverly Hills enables us to grant upgrades at both Micanopy and Sarasota. In this connection, we believe that upgrading Station WRRX in Micanopy to specify operation on Channel 247C2 and Station WSRZ in Sarasota to specify operation on Channel 293C2 would both be in the public interest.[7] These latter two upgrades represent a net service gain of 891,315 persons compared to a net service gain of 213,636 persons if we were to grant a Class C2 upgrade to Beverly Hills instead of the Class C3 upgrade. Under priority four, above, the upgrades at Micanopy and Sarasota are favored over a Class C2 upgrade at Beverly Hills because of the population differential of over 677,000 persons. In the present situation, we are aware that approximately 562 additional persons would have received a fourth aural service if we were to upgrade Station WXOF to a Class C2 facility. It is our view that a fourth aural service to an additional 562 persons does not override the substantial public interest benefit of new FM reception services to over 677,000 persons. *See Benton and Dardanelle, Arkansas*, 7 FCC Rcd 2555 (1992); *cf. Christian Broadcasting of Midlands, Inc.*, 99 FCC 2d 578 (1984).

6. Heart of Citrus filed reply comments directed against the Sarasota-FM/Gator counterproposal looking toward a Channel 292C3 upgrade at Beverly Hills instead of its preferred Channel 246C2 upgrade. In addition to the arguments concerning third and fourth aural services discussed above, Heart of Citrus contends that the proposed site, 19.9 kilometers (12.4 miles) south of Beverly Hills, for the Channel 292C3 upgrade is "within a platted residential subdivision and is not available for tower construction." As such, Heart of Citrus argues that any alternate site further from Beverly Hills will preclude the requisite 70 dBu principal city service required by Section 73.315(a) of the Rules. We will not deny a Channel 292C3 upgrade at Beverly Hills on the basis of this unsupported allegation. It continues to be our view that in a rule making proceeding to allot an FM channel, there must be a theoretical site which meets the Commission's various technical rules. *See e.g., Randolph and Brandon, Vermont*, 6 FCC Rcd 1760, 1764 n.4 (1991); *see also Key West, Florida*, 3 FCC Rcd 6423 (1988). As long as such a site is shown to exist, we will typically presume at the allotment stage that it is theoretically available and will use it as a basis for making the allotment. However, we will take into account a showing by a party that, in reality, no theoretical site exists because of environmental, zoning, air hazard or other similar considerations. In this case, Heart of Citrus did not make such a showing. Even assuming that the proposed site is within a "platted residential subdivision," there is no indication as to the size of this area or the unavailability of a suitable site outside of this area, or a showing that a local zoning authority would not approve the construction of a tower.[8]

Holiday and Chiefland, Florida

7. In order to accommodate the upgrades at Beverly Hills, Micanopy, and Sarasota, it is necessary to make related channel substitutions at Holiday, Florida, and Chiefland, Florida. In regard to Holiday, we note that in MM Docket No. 87-455, we are currently considering a proposal by Pasco Pinellas Broadcasting Company, licensee of Station WLVU, Channel 292A, Holiday, Florida, proposing the substitution of Channel 292C2 for Channel 292A at Holiday and modification of the Station WLVU license to specify operation on Channel 292C2. As discussed in paragraph 2, *supra*, Sarasota-FM/Gator proposed an alternative Channel 246C2 upgrade for Station WLVU. The Sarasota-FM/Gator counterproposal in this proceeding has three benefits. First, it enables us to upgrade Station WLVU to a Class C2 facility and resolve MM Docket No. 87-455. As an "incompatible channel swap" in conjunction with the proposed Channel 292C3 upgrade for Beverly Hills, we are able to upgrade Station WLVU to Channel 246C2 without entertaining other expressions of interest in the upgraded allotment. Second, a Channel 246C2 upgrade at Holiday enables us to upgrade Station WXOF in Beverly Hills to Channel 292C3 which, in turn, enables us to upgrade Station WRRX in Micanopy to Channel 247C2. Third, a Channel 246C2 upgrade at Holiday enables us to upgrade Station WSRZ in Sarasota to Channel 293C2. Along with the three other upgrades in this proceeding, we believe that

[6] The reference coordinates for the Channel 292C3 allotment at Beverly Hills, Florida, are 28-44-09 and 82-29-56. This site is 19.9 kilometers (12.4 miles) south of Beverly Hills. Inasmuch as the principal city service contour of a Class A FM station will extend 23.2 kilometers (14.4 miles), this allotment will provide principal city service to Beverly Hills. Because the petition for rule making which resulted in this allotment was filed prior to October 2, 1989, Heart of Citrus, Inc., may avail itself of the provisions of Section 73.213(c)(1) of the Rules with respect to Station WEAG, Channel 292A, Starke, Florida.

[7] The reference coordinates for the Channel 247C2 allotment at Micanopy, Florida, are 29-38-55 and 82-25-30. This site is 21.1 kilometers (13.1 miles) northwest of Micanopy. The reference coordinates for the Channel 293C2 allotment at Sarasota, Florida, are 27-27-49 and 82-40-01. This site is 19.4 kilometers (12.1 miles) northwest of Sarasota.

[8] Heart of Citrus also argues that the Sarasota-FM/Gator counterproposal should not be considered because Pasco Pinellas, licensee of Station WLVU in Holiday, has not consented to a Channel 246C2 upgrade. In this regard, we note that Pasco Pinellas has requested a Channel 292C2 upgrade in MM Docket No. 87-455, and has filed reply comments in this proceeding supporting the proposed Channel 246C2 upgrade. As a consequence, the Heart of Citrus argument is not well taken.

the public interest would be served by upgrading Station WLVU in Holiday, Florida, to specify operation on Channel 246C2.[9]

8. We are substituting Channel 300A for Channel 247A at Chiefland, Florida, and modifying the license of Station WLQH, Chiefland, to specify operation on Channel 300A.[10] This channel substitution enables Station WRRX to upgrade to Channel 247C2. White Construction Co., Inc., licensee of Station WLQH, filed reply comments in this proceeding consenting to its proposed channel substitution. These reply comments also expressed a concern with a potential difficulty in obtaining reimbursement from Gator for the costs of changing the Station WLQH channel. As the beneficiary of this substitution, Gator will be required to reimburse White Construction Co., Inc. for the reasonable expenses of changing its channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). In view of the fact that Gator has stated its willingness to meet this requirement, we believe, based on our previous experience, that any issue as to the amount of reimbursement can be resolved by the parties without Commission intervention.

Other Matters

9. Sarasota-FM/Gator also advanced two alternative proposals concerning Beverly Hills which are not being considered in this proceeding. The first alternative is identical to the Sarasota-FM/Gator counterproposal except for a proposed substitution of Channel 292A for Channel 246A at Beverly Hills. In this proceeding, we believe that a Class C3 facility at Beverly Hills would provide a greater public interest benefit. Accordingly, a Channel 292A substitution is not being considered. The second rejected alternative involves upgrading Station WXOF to Channel 292C3 and reallotting the channel to either Inverness or Sugarmill Woods, Florida. This proposal was filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules which provides for the reallotment of a channel to a new community and modification of the license or construction permit to reflect the new community. *See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). In addition to the fact that Heart of Citrus has specifically disavowed any interest in changing the community of license for Station WXOF, there is no provision in Section 1.420(i) of the Rules or *Community of License* for a third party to propose a change in community of license. As such, there is no basis to consider the second alternative.

10. Highlands Media Company, Inc., Roper Broadcasting, Inc., and WGUL-FM, Inc. filed reply comments raising identical concerns. These parties are proponents of proposals awaiting the outcome of a pending rule making proceeding in MM Docket No. 87-455. *See Order to Show Cause* in MM Docket No. 87-455, 7 FCC Rcd 2642 (1992). After noting that both Sarasota-FM and Gator filed defective and untimely proposals in MM Docket No. 87-455, these parties argue that the Sarasota-FM/Gator counterproposal in this proceeding is an effort to "bootstrap their way out of the consequences of their earlier errors." In view of the fact that MM Docket No. 87-455 is older and "ripe" for resolution, these parties contend that MM Docket No. 87-455 should be resolved prior to resolution of this proceeding. We will not grant the requested relief. Sarasota-FM/Gator filed a valid counterproposal in this proceeding enabling us to grant four upgrades of existing stations. We believe that each upgrade provides significant public interest benefits. In regard to MM Docket No. 87-455, there are two remaining matters that have not been resolved. The first involves a proposal to upgrade Station WLVU to Class C2 status. The second is an Application for Review filed by Sarasota-FM directed against the denial of its proposal to upgrade Station WSRZ to Channel 293C2. Inasmuch as we are upgrading both of these stations to Class C2 status in this proceeding, we will be able to expeditiously terminate MM Docket No. 87-455.

11. We are also taking this opportunity to take a related administrative action. On August 30, 1989, Gator filed a petition for rule making looking toward a Channel 247C2 upgrade for Station WRRX (RM-7091). In order to accommodate this upgrade, Gator proposed the substitution of Channel 246C2 for Channel 292A at Holiday, the substitution of Channel 292A for Channel 246A at Beverly Hills, and the substitution of Channel 300A for Channel 247A at Chiefland. In view of our action in this proceeding upgrading Station WRRX to specify operation on Channel 247C2, we are dismissing this petition for rule making as moot.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below to read as follows:

Community	Channel No.
Beverly Hills, Florida	292C3
Chiefland, Florida	300A
Holiday, Florida	246C2
Micanopy, Florida	247C2
Sarasota, Florida	273C, 288A, 293C2

13. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Ranch and Grove Holding Corporation, Station KA2XXZ, 1675 Buena Vista Drive, Lake Buena Vista, Florida 32830.

[9] The reference coordinates for the Channel 246C2 allotment at Holiday, Florida, are 28-16-51 and 82-42-52. This site is 10.6 kilometers (6.6 miles) north of Holiday.

[10] The reference coordinates for the Channel 300A allotment at Chiefland, Florida, are 29-31-00 and 82-53-11. This site is 5.1 kilometers (3.2 miles) northwest of Chiefland. This is the current site of licensed Channel 247A facilities of Station WLQH. In this regard, we note that experimental broadcast Station KA2XXZ operates in Columbia, Florida, on Channel 300A at an effective radiated power of 250 watts. The Station KA2XXZ operation on Channel 300A would cause objectional interference to Channel 300A operation at Chiefland. This authorization, originally granted December 20, 1988, was expressly subject to summary rescission or modification without prior notice, right to hearing or any procedural recourse. As such, it will be necessary for Station KA2XXZ to terminate operation on Channel 300A upon commencement of operation on Channel 300A by Station WLQH.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Heart of Citrus, Inc., for Station WXOF, Beverly Hills, Florida, IS MODIFIED to specify operation on Channel 292C3 in lieu of Channel 246A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Pasco Pinellas Broadcasting, Inc., for Station WLVU, Holiday, Florida, IS MODIFIED to specify operation on Channel 246C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gator Broadcasting Corporation for Station WRRX, Micanopy, Florida, IS MODIFIED to specify operation on Channel 247C2 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Commissions Act of 1934, as amended, the license of Sarasota-FM, Inc., for Station WSRZ, Sarasota, Florida, IS MODIFIED to specify operation on Channel 293C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of White Construction Co., Inc., for Station WLQH, Chiefland, Florida, IS MODIFIED to specify operation on Channel 300A in lieu of Channel 247A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the above authorization for Station WLQH except for the channel as specified above. Any other change, except those specified under Section 73.1260 of the Commission's Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Commission's Rules, PROVIDED the transmission facilities comply in all respects to the station's authorization except for the channel as specified above, and a license application is filed within 10 days of commencement of program tests.

19. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Gator Broadcasting Corporation, licensee of Station WRRX, and Sarasota-FM, Inc., licensee of Station WSRZ, are required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

20. IT IS FURTHER ORDERED, That the counterproposal filed by Heart of Citrus, Inc. (RM-8123) IS DENIED.

21. IT IS FURTHER ORDERED, That the petition for rule making filed by Gator Broadcasting Corporation (RM-7091) IS DISMISSED as moot.

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

23. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-85

In the Matter of

Amendment of Part 97 of the	RM-7649 RM-7669
Commission's Rules Concerning	RM-7675 RM-7676
Message Forwarding Systems in	RM-7681 RM-7904
the Amateur Service.	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 18, 1993; Released: March 29, 1993

Comment Date: July 1, 1993
Reply Comment Date: August 1, 1993

By the Commission:

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (*Notice*), we propose to amend the rules concerning amateur stations participating in message forwarding systems.[1] This proceeding was initiated by six petitions for rule making.[2]

II. BACKGROUND

2. Currently, the rules that apply to control operator responsibility for content of messages for an amateur station participating in a message forwarding system are the same rules that apply to the control operator of any other amateur station.[3] Essentially, under the current rules, all intermediate relay stations have responsibility to assure that the content of each retransmitted message complies with the amateur service rules, even though the message may be received and retransmitted automatically. The petitioners claim, however, that Section 97.103(a) of the Commission's Rules, 47 C.F.R. § 97.103(a), hampers unnecessarily the operation of high speed message forwarding systems[4] and repeaters.[5] The petitioners claim that the potential for transmitting large numbers of messages in these systems cannot be achieved because Section 97.103(a) does not distinguish between the responsibilities of the station originating and those only forwarding or repeating violative communications.[6] They state that Section 97.103(a) leaves no alternative but for the control operator of every forwarding station in a system to delay the retransmission of each message until after it is reviewed carefully.[7] They claim, moreover, that amateur operators are reluctant to participate in high speed message forwarding systems because their stations might retransmit violative communications inadvertently.[8]

3. The petitioners request that the Commission modify its compliance policy for stations participating in message forwarding and voice repeater systems. Specifically, the petitioners request that we hold the licensee of the station originating a message primarily accountable for violative communications. Under this approach, licensees of stations that only retransmit messages would not be held accountable for communications they forward or their stations retransmit unwittingly.[9] The objective of this proceeding, therefore, is to ascertain what special rules, if any, should be provided for message forwarding systems.

III. DISCUSSION

4. We concur with the petitioners that it is impractical to apply the current policy regarding licensee accountability to all stations in message forwarding systems. Requiring a message-by-message screening procedure at each forwarding station greatly reduces the efficiency of these systems. On the other hand, like the petitioners, we are concerned about the potential for misuse of these systems. Therefore, we want to examine our general policy for message forwarding systems.

5. The petitioners recommend that only the station licensee and the control operator of the station that originates a communication that violates the rules be held responsible. While we agree that the originating station licensee and control operator should be held responsible

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[1] A message forwarding system is a group of amateur stations participating in a voluntary, cooperative, interactive arrangement where messages and other communications from the control operator of an originating station are transmitted to one or more destination stations via forwarding stations, which may or may not be automatically controlled.

[2] The petitions were received from Tom M. Blackwell and Joe Jarrett (RM-7649), John S. Burningham (RM-7676), James N. Howard, Jr. (RM-7669), Michael R. Reynolds (RM-7904), Robert Charles Rogers, Donald LaBrenz II, and George Schemm (RM-7681), and Douglas E. Smith (RM-7675).

[3] *See* Part 97 Subpart B - Station Operation Standards, Sections 97.101 through 97.121 of the Commission's Rules, 47 C.F.R §§ 97.101-97.121.

[4] Amateur operators frequently refer to these systems as automated packet radio message forwarding systems or packet networks, linked repeater networks, digipeaters, and packet radio bulletin boards.

[5] RM-7649 requests amendment of the rules as they apply to voice repeater operation. RM-7676 requests amendment of the rules as they apply to repeater and data system operation generally. The other four petitions are directed to amendment of the rules as they apply only to amateur stations transmitting digital communications.

[6] Section 97.113 of the Commission's Rules, 47 C.F.R. § 97.113, prohibits amateur stations from transmitting music; communications in connection with any activity that is contrary to law; encrypted messages; words, language, or meaning that is obscene, indecent, or profane; and false or deceptive messages or signals. It also prohibits any communication the purpose of which is to facilitate the business affairs of any party and transmitting communications as an alternative to any other authorized radio service. Revisions to these prohibitions are being considered in another rule making proceeding. *See Notice of Proposed Rule Making*, PR Docket No. 92-136, 7 FCC Rcd 4231 (1992).

[7] RM-7904 at 1.

[8] RM-7669 at 2.

[9] RM-7649 at 1, RM-7669 at 2, RM-7675 at 3, RM-7676 at 1, RM-7904 at 1.

for violative communications they originate,[10] we are not convinced that only holding the originating station licensee responsible would be sufficient to prevent misuse of message forwarding systems. It appears that the control operator of the station that first forwards[11] communications from the originating station on behalf of the system is also in a good position to determine if those communications violate the rules and take corrective action where necessary. Therefore, in addition to holding the originating station licensee and control station operator accountable, we propose to add new Section 97.217 to the rules to also hold the control operator of the first forwarding station accountable for communications transmitted within a message forwarding system. We believe that this approach would allow high speed message forwarding systems to operate as efficiently as they are intended and still provide the safeguards necessary to prevent system misuse.[12] Under this approach, the only delay occurs during screening at the first forwarding station. Thereafter, all other stations can retransmit the message with little or no delay. Because of the standardized format of the amateur AX.25 frames, for example, both the originating and first forwarding station can be readily identified.[13]

6. To avoid confusion regarding the meaning of the term "message forwarding system", we propose to add a definition of this term in Section 97.3 of the Rules, 47 C.F.R. § 97.3. We also propose to revise the definition of the term "repeater" in Section 97.3 to clarify the difference between a repeater and a message forwarding system and to reflect the practical meaning that "repeater" appears to have in the amateur service, *i.e.*, a station that uses different channels to receive and instantaneously retransmit the frequency or phase modulated voice or television transmissions of another station. Further, we propose to codify in Section 97.205, 47 C.F.R. § 97.205, the existing compliance policy applicable to control operators of repeater stations. Under this policy, established in the *Memorandum Opinion and Order* in Docket No. 21033, 67 FCC 2d 1107 (1978), the control operator of a repeater is not held accountable for communications retransmitted inadvertently by the repeater station.

IV. CONCLUSION

7. This proposal would serve the public interest by removing a barrier to automatic message forwarding systems relaying messages at high speeds, thereby making more efficient use of available radio spectrum and encouraging greater numbers of licensees to participate in message forwarding systems. Additionally, these rules would provide improved communications capabilities while protecting against abuse. We seek comment, therefore, on the rule changes as proposed in the Appendix.

V. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be any significant economic impact on small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur service may not be used to transmit business communications on a regular basis. *See* 47 C.F.R. § 97.113(a). The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

Comment Dates

10. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(b), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(b), (g), and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **July 1, 1993,** and reply comments on or before **August 1, 1993** . To file formally in this proceeding, you must file an original and five copies of all comments, and reply comments. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number is specified in the heading. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

11. For further information, contact William T. Cross, Personal Radio Branch, Private Radio Bureau, (202) 632-4964.

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[10] *See* Sections 97.103 and 97.105 of the Rules.

[11] The first forwarding station is the station that receives a communication directly from the originating station and inputs it into the "system." The first forwarding station licensee could establish guidelines for messages that the station will accept for introduction into the message forwarding system. For example, the control operator of the first forwarding station could personally review each message prior to allowing its introduction into the system or could accept the risk of retransmitting a message from an originating station whose licensee the control operator deems trustworthy without checking it.

[12] Although control operators of forwarding stations other than the first forwarding station would no longer have to screen each message, they would be responsible for discontinuing communications that violate the rules once they become aware of their presence.

[13] The AX.25 Amateur Packet-Radio Link-Layer Protocol specifies the content and format of a packet-radio frame and how that frame is processed at the Link layer by packet-radio stations. This protocol was one of the first protocols used in amateur service automatic message forwarding systems.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 97 - Amateur radio service

1. The authority citation for Part 97 would continue to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.3(a) would be amended by redesignating paragraphs (28) through (44) as paragraphs (29) through (45), respectively, adding a new paragraph (28), and revising paragraph (36) to read as follows:

§ 97.3 Definitions.

(a) ***

(28) *Message forwarding system.* A group of amateur stations participating in a voluntary, cooperative, interactive arrangement where communications are sent from the control operator of an originating station to the control operator of one or more destination stations by one or more forwarding stations.

* * * * *

(36) *Repeater.* An amateur station that instantaneously retransmits on a different channel the angle-modulated phone or image emission transmission of another amateur station.

* * * * *

3. Section 97.109(e) would be revised to read as follows:

§ 97.109 Station control.

* * * * *

(e) No station may be automatically controlled while transmitting third party communications, except a station participating as a forwarding station in a message forwarding system.

4. Section 97.205 would be amended by adding new paragraph (g) to read as follows:

§ 97.205 Repeater station.

* * * * *

(g) The control operator of a repeater is not accountable for violative communications that the repeater retransmits inadvertently.

5. Subpart C of Part 97 would be amended by adding new Section 97.217 to read as follows:

§ 97.217 Message forwarding system.

(a) Any amateur station may participate in a message forwarding system, subject to the privileges of the class of operator license held.

(b) The control operator of the station originating a message and the control operator of the first station retransmitting that message are accountable for violative communications that are transmitted in a message forwarding system. The control operators of other stations inadvertently retransmitting violative communications in a message forwarding system are not accountable for the violative communications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. LOUIS RADIO

Application for authority to close Maritime Mobile Public Coast Station WHD871, Jackson, Illinois	File No. I-T-D-93-005
Application for authority to close Maritime Mobile Public Coast Station WGK, Warrenton, Missouri	File No. I-T-D-93-006
Application for authority to close Maritime Mobile Public Coast Station WGK C, Madonnaville, Illinois	File No. I-T-D-93-007
Application for authority to close Maritime Mobile Public Coast Station WGK with locations at Granite City, Pere Marquette and Pittsfield, Illinois	File No. I-T-D-93-008

ORDER AND AUTHORIZATION

Adopted: March 18, 1993; Released: March 30, 1993

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on November 13, 1992, by St. Louis Radio request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from Maritime Mobile Public Coast Stations WHD871, (File No. 867263), located at Dry Hill, Jackson, Illinois, WGK (Warrenton), (File No. 192-M-ML-13), located at Warrenton, Missouri, WGK C, (File No. 160-M-ML-63), located at Madonnaville, Illinois, and WGK (File Nos. 862548-MC-RL-30, 177-M-ML-81 and 176-M-ML-81) with locations at Granite City, Pere Marquette and Pittsfield, Illinois, six locations in all. The applications were placed on public notice on January 27, 1993. No comments were received.

2. The basis statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future publi: convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of the applications, St. Louis Radio states that there has been a steady decline in traffic over the past five years due to increased use of cellular and other services, as well as the presence of another carrier in the area providing identical services. Distress calls are handled by the US Coast Guard.

4. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via stations WHD871, WGK (Warrenton), WGK C and WGK (3 locations).

5. Accordingly, IT IS ORDERED that applications File Nos. I-T-D-93-005, I-T-D-93-006, I-T-D-93-007 and I-T-D-93-008 ARE GRANTED, and St. Louis Radio is authorized to discontinue service via its public coast stations WHD871, Jackson, Illinois, WGK, Warrenton, Missouri, WGK C, Madonnaville, Illinois and WGK, locations at Granite City, Pere Marquette, and Pittsfield, Illinois.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order *(see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] Public Coast Radiotelegraph Stations, 67 FCC 2d 790, at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable & Wireless Communications, Inc. — File No. I-T-C-92-191

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services of other common carriers to provide switched voice service to specific international points

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1993; Released: March 29, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 18, 1992, Communications Satellite Corporation (Comsat) filed a Motion for Partial Stay (Motion) of a decision by the Common Carrier Bureau (Bureau) granting Cable & Wireless Communications, Inc. (CWCI), *inter alia*, authority to resell the international switched tariffed services provided by MCI Telecommunications Corporation (MCI) and US Sprint (Sprint) between the United States and the Atlantic, Pacific, and Indian Ocean Regions (AOR, POR, and IOR).[1] Comsat seeks the partial stay pending the Commission's final determination of its Petition for Reconsideration (Petition) of CWCI's authorization. For the reasons discussed herein, we deny Comsat's Motion.

II. BACKGROUND

2. On October 15, 1992, the Bureau granted CWCI Section 214 authority to resell international switched voice services provided by AT&T, MCI, and Sprint. The authorization included International Maritime Satellite (INMARSAT) services between the United States and ships in the AOR, POR, and IOR. It is the resale of those INMARSAT services that Comsat challenges, in both its Motion and the underlying Petition.

3. The Petition, filed on November 30, 1992, asserts that the public notice of CWCI's Section 214 application did not give adequate notice that CWCI intended to resell INMARSAT maritime services, and requests that the Commission rescind CWCI's authorization with respect to that resale. Comsat further asserts that (1) MCI and Sprint are not authorized to provide end-to-end, shore-to-ship maritime mobile satellite switched voice services, and (2) the resale of INMARSAT services is in violation of the International Maritime Satellite Tele-communications Act (INMARSAT Act), 47 U.S.C. §§751 *et seq.*, and is contrary to the legislative history of the INMARSAT Act and Commission policy. CWCI filed an opposition to Comsat's petition, and several other parties filed comments.[2]

4. In its Petition, Comsat argues that, under the INMARSAT Act, Congress designated Comsat as the "sole operating entity of the United States for participation in INMARSAT, for the purpose of providing international maritime satellite communications services."[3] Comsat states that, in implementing the INMARSAT Act, the Commission set forth the "participating carrier" arrangement as the basic policy for interconnection between Comsat and international or domestic carriers to extend maritime satellite services. Comsat asserts that, as a participating carrier, it is the exclusive provider of satellite transmission services between its earth stations and ships. Comsat concludes that, under a participating carrier arrangement, CWCI cannot lawfully resell shore-to-ship maritime satellite switched voice service.

5. In its opposition, CWCI contends that the participating carrier arrangement embodied in the INMARSAT Act was not intended to foreclose resale, but to provide a means of nondiscriminatory access by landline carriers into a monopoly system.[4] CWCI further contends that the Commission's policy under the INMARSAT Act is to promote competition and customer choice,[5] and that this policy is reflected in the tariffs filed by MCI and Sprint establishing connection with Comsat. For its part, IDB Mobile asserts that the resale of INMARSAT services does not compromise Comsat's exclusive authority.[6] IDB Mobile also asserts that the participating carrier model seeks to ensure that service is provided on a through-route basis, and there is no reason why through-route service cannot be resold. Further, IDB Mobile contends that there is no case law holding that through-route service and resale are incompatible. It concludes that any preference expressed by Congress in the legislative history for a participating carrier over a carrier's carrier arrangement has no discernible relationship to the question of whether carriers should be

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[1] *See* Order Authorization and Certificate, 7 FCC Rcd 6855 (1992). CWCI's authorized services were based on American Telephone & Telegraph Company's (AT&T's) Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and Sprint's Tariff F.C.C. Nos. 1 and 2.

[2] AT&T, IDB Aero-Nautical Communications, Inc. (IDB Mobile), and Sprint.

[3] INMARSAT Act, §503(a)(1), 47 U.S.C. §752(a)(1).

[4] *See also* AT&T and IDB Mobile comments.

[5] *See* Implementation of Requirements of the International Maritime Satellite Telecommunications Act, 71 F.C.C. 2d 1069, 1080-81 (1979) (*Implementation Order*). The *Implementation Order* set forth the operational arrangements for interconnection with the INMARSAT system. Specifically, it (1) defines the major principles under which Comsat would interconnect with U.S. international common carriers and private communications systems to provide maritime communications services, and (2) establishes an operational framework by which these principles can be implemented. *Id.* at 1079.

[6] IDB Mobile analogizes this arrangement to the Commission's grant of a single domestic mobile satellite service license, in which resale of domestic mobile satellite service is clearly permitted. *Land Mobile Satellite Service*, 2 FCC Rcd 490 and n.58 (1987).

permitted to resell Comsat's INMARSAT maritime services. Finally, Sprint contends that Comsat did not protest when Sprint filed tariffs for maritime satellite service in 1989 despite the fact that the tariff clearly provided for end-to-end maritime satellite shore-to-ship service.

III. DISCUSSION

6. In its Motion, Comsat argues that, if the Bureau's Order is not stayed, CWCI will be able to provide end-to-end maritime mobile service but Comsat will continue to be barred from providing terrestrial services beyond the earth stations. Comsat claims that this arrangement would adversely affect its competitive position. Comsat also argues that the services which CWCI was authorized to resell cannot lawfully be provided under the INMARSAT Act or pursuant to Commission policy. Finally, Comsat contends that CWCI did not clearly set forth the scope of its proposed maritime services in its Section 214 application. Thus, it claims, any injury CWCI may suffer from the issuance of a stay is wholly attributable to CWCI's inadequate application. CWCI opposes Comsat's motion, arguing that Comsat fails to establish any elements of the test for issuance of a stay.[7]

7. The Commission may grant a motion to stay upon review of the following factors: (1) likelihood that the party seeking the stay will prevail on the merits of the underlying petition; (2) likelihood of irreparable harm to the moving party; (3) consideration of harm to other parties to the proceeding; and (4) public interest considerations.[8] Based on our analysis of the record, we find that Comsat has not demonstrated that a stay is merited under these criteria, and we deny its motion.

8. With regard to the likelihood that Comsat will prevail on the merits, we note that Comsat has not cited any explicit language in the *Implementation Order* which suggests that the Commission intended to prohibit resale. Indeed, the *Implementation Order* states:

> We expect that this policy [for implementing INMARSAT service] will permit a wide range of customer choices for accessing the satellite system by affording customers opportunity to seek alternative means of such access among a variety of carriers. In addition, we anticipate that it will encourage innovation and diversity in utilization of the satellite system to meet varied maritime communications needs.[9]

This language indicates that the Commission intended to foster competition and allow for customer choice, which might include resale. Thus, while it would be premature to resolve this question here, we cannot conclude that Comsat has shown that resale is prohibited, and that it is likely to prevail on the merits of its Petition.

9. As to the second factor, we believe that Comsat has not demonstrated that it will suffer irreparable harm if a stay of our order is not granted. Comsat merely relies on a bare statement that its competitive position would be adversely affected vis-a-vis interconnected carriers. Comsat proffers no clear evidence concerning how or why its competitive position would be adversely affected. Mere allegations of economic impact, however, do not establish the requisite level of injury to warrant a stay. A party moving for a stay is required to demonstrate that the injury claimed is both "certain and great."[10] In short, the speculative economic losses to which Comsat refers do not constitute irreparable harm. *See generally, Virginia Jobbers.*

10. Finally, we believe that it is not in the public interest to grant a stay.[11] Resale of a common carrier's service can help curtail non-cost based discriminatory pricing by the underlying carrier. Resale also permits a wide range of customer choice and encourages innovation, diversity of service and lower prices.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that Comsat's Motion for a Partial Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[7] CWCI Opposition at 2-3. Specifically, CWCI argues that (1) its application afforded the required general description of the authority requested; (2) Comsat merely states that its competitive position may be diminished and, therefore, proffers no evidence of irreparable harm; (3) CWCI and its customers would be denied the opportunity to employ INMARSAT services using their landline carrier of choice if a stay is granted; and (4) a stay would not be in the public interest.

[8] *Virginia Petroleum Jobbers Ass'n v. FCC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Jobbers*). Also, Comsat, citing *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985), states that a stay may be granted with either a high probability of success and some injury, or vice versa.

[9] *Implementation Order* at 1081.

[10] Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (1985). "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin." *Id.*

[11] Because Comsat has failed to make an adequate showing of the likelihood of success on the merits of the underlying petition and of irreparable harm, the Commission need not address whether a stay would substantially harm other parties interested in the proceedings. The court in *Virginia Jobbers* found that only if the petitioner has been successful in showing probable success and irreparable injury need the court address the possibility of serious adverse effects on other interested persons. *Virginia Jobbers* at 925. Indeed, the court states that without a substantial indication of probable success on the merits, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STERLING COMMUNICATION, INC. File No. I-T-C-93-016

Application for authority to acquire and operate facilities and to resell services for provision of various international services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 19, 1993; Released: March 29, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed on October 23, 1992 by Sterling Communication, Inc. (Sterling), IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-016 IS GRANTED, and Sterling is authorized to:

a. lease from Comsat and operate a total of 306 voice-grade satellite half-circuits: 210 voice-grade half-circuits between an appropriately licensed earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean and 96 voice-grade half-circuits between an appropriately licensed earth station on the west coast of the United States mainland and an appropriate satellite over the Pacific Ocean;

b. lease and operate 210 voice-grade circuits in the appropriatly licensed east coast earth station and 96 voice-grade circuits in the appropriately licensed west coast earth station in the U.S. mainland;

c. lease and operate domestic connecting facilities between the east and west coast earth stations and Sterling's New York Network Operating Center and a one-half interest in any necessary overseas connecting facilities;

d. use the said facilities in a, b and c above to provide international switched telecommunications services between the U.S. and the following points;

Country	Satellite	No. of Circiuts
China (PRC)	POR	12
Commonwealth of Independent States	AOR	6
Costa Rica	AOR	6
Czech and Slovak Republics	AOR	6
Egypt	AOR	6
El Salvador	AOR	6
France	AOR	12
Germany	AOR	12
Greece	AOR	6
Guatemala	AOR	6
Honduras	AOR	6
Hong Kong	POR	6
Hungary	AOR	6
India	AOR	12
Indonesia	POR	6
Iran	AOR	12
Ireland	AOR	6
Israel	AOR	6
Italy	AOR	12
Japan	POR	12
Kenya	AOR	6
Nicaragua	AOR	6
Pakistan	AOR	12
Panama	AOR	6
Philippines	POR	12
Poland	AOR	6
Saudi Arabia	AOR	6
Singapore	POR	12
South Korea	POR	12
Sri Lanka	AOR	6
Taiwan	POR	12
Thailand	POR	12
Turkey	AOR	6
United Arab Emirates	AOR	12
United Kingdom	AOR	12
Ukraine	AOR	6

e. lease from Comsat channels of communications between any earth station in the U.S. mainland licensed for the provision of IBS and/or television service and INTELSAT Atlantic and Pacific satellites for the provision of IBS and associated digital video services and international television service between the U.S. mainland and those countries which are or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS and/or television services. Provided, however, this blanket Section 214 authorization is without commitment as to the Commission's action on any IBS or television Title III application that Sterling may file in the future; and

f. provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and those points listed in those tariffs.

3. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between Sterling and its correspondents, and a copy of the agreements shall be filed with the Commission within 30 days of its execution; and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

5. IT IS FURTHER ORDERED that our authorization of Sterling to provide private lines is limited to the provision of such private lines only between the United States and those countries listed in Comsat's IBS tariff -- that is, private lines which originate in the United States and terminate in those countries listed in Comsat's IBS tariff or which originate in those countries listed in Comsat's IBS tariff and terminate in the United States. In addition, Sterling may not -- and Sterling's tariff must state that Sterling's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or those countries listed in Comsat's IBS tariff end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that those countries listed in Comsat's IBS tariff afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

6. IT IS FURTHER ORDERED that neither Sterling nor any persons or companies directly or indirectly controlling or controlled by Sterling, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sterling or any persons or companies controlling or controlled by Sterling are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file the circuit addition reports required by Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b) for any additional circuits acquired.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STRATEGIC ALLIANCES INC. File No. I-T-C-93-045

Application for authority to operate as an international resale carrier.

HARVEY HOTELS File No. I-T-C-93-049

Application for authority to operate as an international resale carrier.

ATLANTIC PAYPHONE CO., INC. File No. I-T-C-93-060

Application for authority to operate as an international resale carrier.

MFS INTELENET, INC. File No. I-T-C-93-065

Application for authority to operate as an international resale carrier.

COASTAL AUTOMATED COMMUNICATIONS CORP. File No. I-T-C-93-067

Application for authority to operate as an international resale carrier.

VADACOM, INC. File No. I-T-C-93-069

Application for authority to operate as an international resale carrier.

THE FURST GROUP, INC. File No. I-T-C-93-071

Application for authority to operate as an international resale carrier.

AMER-I-NET SERVICES, CORP. File No. I-T-C-93-073

Application for authority to operate as an international resale carrier.

POLAR COMMUNICATIONS CORP. File No. I-T-C-93-074

Application for authority to operate as an international resale carrier.

XIEX TELECOMMUNICATIONS, INC. File No. I-T-C-93-076

Application for authority to operate as an international resale carrier.

TOUCH 1 INCORPORATED File No. I-T-C-93-077

Application for authority to operate as an international resale carrier.

ENTERPRISE TELCOM SERVICES, INC. File No. I-T-C-93-079

Application for authority to operate as an international resale carrier.

AMERICAN COMMUNICATION CORPORATION File No. I-T-C-93-082

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 22, 1993; Released: March 29, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by Strategic Alliances Inc. (SAI), Harvey Hotels (Harvey), Atlantic Payphone Co., Inc. (Atlantic), MFS Intelenet, Inc. (MFS), Coastal Automated Communications Corp. (Coastal), Vadacom, Inc. (Vadacom), The Furst Group, Inc. (TFG), Amer-I-Net Services Corp. (ANSC), Polar Communications Corp. (Polar), Xiex Telecommunications, Inc. (Xiex), Touch 1 Incorporated (Touch 1), Enterprise Telcom Services, Inc. (ETS) and American Communication Corp. (ACC).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-93-045, I-T-C-93-049, I-T-C-93-060, I-T-C-93-065, I-T-C-93-067, I-T-C-93-069, I-T-C-93-071, I-T-C-93-073, I-T-C-93-074, I-T-C-93-076, I-T-C-93-077, I-T-C-93-079 and I-T-C-93-082 ARE GRANTED; and

a. SAI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and Sprint's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

b. Harvey is authorized to provide international switched voice services by the resale of the international switched voice services set forth in ATC Long Distance's Tariff F.C.C. No. 1 between the U.S. and international points listed in that tariff;

c. Atlantic is authorized to provide international switched voice services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, Allnet's Tariff F.C.C. No. 5, Wiltel's Tariff F.C.C. No. 2 and Metromedia's Tariff F.C.C. No. 2 between the U.S. and international points listed in those tariffs;

d. MFS is authorized to provide international switched voice services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, TRT/FTC's Tariff F.C.C. No. 15, Litel's Tariff F.C.C. No. 1, C&W's Tariff F.C.C. No. 3, LDDS's Tariff F.C.C. No. 1 and Wiltel's Tariff F.C.C. No. 2 between the U.S. and international points listed in those tariffs;

e. Coastal is authorized to provide international switched voice services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, and RCI's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

f. Vadacom is authorized to provide international switched voice services by the resale of the international switched voice service set forth in MCI's Tariff F.C.C. No. 1 and Worldcom's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

g. TFG is authorized to provide international switched voice services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, Wiltel's Tariffs F.C.C. Nos. 1 and 2, and Sprint's Tariffs F.C.C. Nos. 1 and 2, between the U.S. and international points listed in those tariffs;

h. ANSC and Polar are authorized to provide international switched voice services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, Sprint's Tariff F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, MCI's Tariff F.C.C. No. 1, TRT/FTC's Tariff F.C.C. No. 15, Wiltel's Tariff F.C.C. No. 2, Litel's Tariff F.C.C. No. 1, RCI's Tariff F.C.C. No. 1, and Advanced Telecommunications' Tariff F.C.C. No. 2, between the U.S. and international points listed in those tariffs;

i. Xiex is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, Sprint's Tariff F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, and MCI's Tariff F.C.C. No. 1, between the U.S. and international points listed in those tariffs;

j. Touch 1 is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, Sprint's Tariff F.C.C. No. 1, Allnet's Tariff F.C.C. No. 5, ACC's Long Distance's Tariff F.C.C. No. 1, ATC's Tariff F.C.C. No. 2 and LDDS' Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

k. ETS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. No. 1 and 12 and LCI's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs; and

l. ACC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in Worldcom's Tariff F.C.C. No. 1 and Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Westchester Council for Public Broadcasting, Inc. to share time with Noncommercial Educational Station WNYE(FM), Brooklyn, New York — BPED-840430IB

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 1993; Released: March 29, 1993

By the Commission:

1. The Commission has before it an application for review filed on May 23, 1988 by the Westchester Council for Public Broadcasting ("WCPB") regarding denial of its petition for reconsideration of the dismissal of the above-captioned application to share time with WNYE(FM), Brooklyn, New York. The New York City Board of Education ("City Board of Education") is the licensee of WNYE. After review of the pleadings, we conclude that the Mass Media Bureau's ("Bureau") ruling was correct, and the application for review does not contain sufficient grounds to warrant a reversal or alteration of the ruling.

BACKGROUND

2. On April 30, 1984, pursuant to 47 C.F.R. §73.561(b), WCPB timely filed its application, which proposed to share time on WNYE's frequency, against that station's license renewal application.[1] On May 14, 1985, pursuant to 47 C.F.R. §73.3568(b), WCPB's application was dismissed by the staff for failure to respond to an official Commission request for additional information and for failure to prosecute its application.

3. In its letter, the staff outlined the threefold rationale that prompted its action as follows: First, the staff, by letter dated February 28, 1985, informed WCPB that pursuant to 47 C.F.R. §73.561(b), its application was deficient with regard to information on its share-time agreement with WNYE and that the applicant should supply the Commission with this information within 30 days of the date of the letter. Such information was not received by the Commission, and the staff therefore concluded that WCPB failed to respond to its official request. WCPB argued that it did respond to the Commission's request through two letters addressed to the Chief, FM Branch, dated March 29, 1985 and May 10, 1985, respectively. The Commission has no record of having received these letters, and WCPB provided no evidence that they were either filed with the Commission or served upon WNYE or its counsel as required by Commission rules. Second, WCPB represented itself to the Commission as a corporate applicant and was required to provide, as an exhibit to its application, copies of its articles of incorporation (or charter) and by-laws, as certified by the Secretary of State or other appropriate official.[2] In its application, WCPB stated that it would later amend its application in this regard; however, over one year after the application was filed, the information was not received nor was any effort made by the applicant to inform the Commission about the status of any progress made regarding its efforts to incorporate. Accordingly, the staff then cited this inaction as a failure by WCPB to prosecute its application. Finally, several months after it filed its application, WCPB lost its transmitter site and requested that the Commission defer action on the application until September 15, 1984, in order to afford WCPB time to file an amendment specifying a new transmitter site. However, by May 15, 1985, no amendment was received naming a new site nor was any effort made to inform the Commission of progress made in the search for a new site or to request additional time to file the amendment. The staff cited this as further evidence of WCPB's failure to prosecute its application.

4. On June 24, 1985, in response to the staff's dismissal of its application, WCPB filed a petition for reconsideration regarding that action. The Bureau concluded that WCPB failed to establish the the dismissal of its application was either erroneous or improper, and the petition for reconsideration was denied on April 21, 1988. WCPB then filed its application for review requesting that the Commission overturn the Bureau's action and reinstate its application *nunc pro tunc*. WNYE filed an opposition to the application for review, and WCPB filed a reply.

DISCUSSION

5. In order to obtain relief through an application for review of action taken pursuant to delegated authority, the aggrieved party must meet at least one of the criteria outlined in 47 C.F.R. §1.115(b)(2). While we find that WCPB has not met its burden in this regard, and therefore does not warrant reversal or alteration of the staff's ruling, we will, nonetheless, briefly address the merits of its arguments.

Time Sharing Arrangement

6. WCPB argues in its application for review that the staff considered it an "undisputed fact" that WCPB failed to respond to its February 28, 1985 letter requesting information about the status of its time sharing arrangement. The staff, however, did not claim that the question of whether WCPB had responded to its letter was undisputed. Rather, the staff asserted that the Commission had no

[1] In pertinent part, 47 C.F.R. §73.561(b) requires that an applicant seeking to share time with a noncommercial educational FM station must attempt to reach an agreement with that station prior to filing its share time application. Upon reaching agreement, such agreement is to be filed with the application, or, if no agreement is reached, the applicant must submit a statement to that effect in the application. The rule calls for a hearing in cases where a share-time arrangement cannot be agreed upon.

[2] The FCC Form 340 now in use no longer requires this documentation. The first revised version of Form 340 incorporating these new changes was made available to the public in July 1985.

record of receiving WCPB's response and no evidence was provided to support WCPB's claim that it filed a response with the Commission. Moreover, WCPB provided no evidence that any response to the letter was served upon WNYE, or its counsel, as required by Commission rules. *See* 47 C.F.R. §1.47. WCPB acknowledges in its application for review that it did not serve WNYE a copy of its response to the staff's letter. WCPB states that because it was not represented by legal counsel, it was unaware that it was required to serve a copy upon WNYE.[3]

7. We agree with the staff's ruling that the photocopies of the two letters that WCPB says it sent to the Commission, dated March 29, 1985 and May 10, 1985, (and which lack any indication that they were filed with the Commission or upon opposing counsel), do not provide sufficient proof that WCPB responded to the official Commission correspondence regarding its time sharing arrangement. The relatively simple devices of securing file-stamped copies and serving documents on opposing parties give applicants the means necessary to document the existence of disputed filings. We recently affirmed that the applicant bears the burden of proving that the documents in question were received by the Commission. *See Hughes-Moore Associates, Inc.*, 7 FCC Rcd 1454 (1992).[4] In this case, the burden has not been met.

8. Even if we were to credit WCPB's claim that the letters in question had been filed with the Commission, the letters merely provided status reports regarding efforts to set up meetings at station WNYE. We note that, pursuant to Section 73.561, these efforts to negotiate should have been initiated prior to the filing of the application, so that either a share-time agreement, or a statement that no agreement could be reached, could have been filed with WCPB's application. Instead, WCPB chose to first file an application and then attempt to proceed with negotiations. Thus, we conclude that WCPB's actions were not consistent with Section 73.561.

Corporate Status

9. When WCPB filed its application to share time with WNYE, certain information regarding the legal status of corporate applicants was required to be submitted with the application. As previously noted, this information was not submitted and the staff cited WCPB's inaction in this regard as evidence of its failure to prosecute its application. In its petition for reconsideration, WCPB stated that it had been "vigorously seeking finalization" of its incorporation process, yet offered nothing to demonstrate its efforts in that regard. Similarly, WCPB alluded to "local political pressures" as the reason for its delay in the incorporation process, yet provided no evidence to support its claim. Therefore, in denying WCPB's reconsideration request, the staff concluded that there was no reason to disturb its earlier ruling on this matter.

10. In its application for review, WCPB now submits affidavits and documentary evidence regarding its unsuccessful efforts to secure the necessary state consents to incorporate. This information relates to a question of fact upon which the staff had no opportunity to pass because this information was not submitted at the reconsideration stage. Additionally, WCPB did not demonstrate why this information could not have been submitted at the reconsideration stage of this proceeding. Pursuant to 47 C.F.R. §1.115(c), "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Accordingly, we will not address the arguments now presented to us on this matter *de novo*.

11. As to the question of why WCPB did not keep the Commission informed of its efforts to incorporate, WCPB claims that it was unaware that the Commission needed a status report, and "believed that if the Commission wanted a status report, it would request one." We find, however, that WCPB's argument is unacceptable, particularly in light of the fact that WCPB promised to amend its application but did not do so. We will, therefore, leave the staff's ruling on this issue undisturbed.

Transmitter site

12. WCPB also argues that the staff erred in concluding that WCPB failed to prosecute its application by not filing an amendment specifying a new transmitter site. WCPB argues that the staff manufactured a justification for condoning what WCPB considered as interference in its efforts to secure a transmitter site. Further, WCPB argues that the staff's rationale was contrary to fact and unsupported by evidence in the record. We disagree. In its reconsideration letter, the staff thoroughly examined WCPB's allegation that it was somehow improperly deprived of the use of its original transmitter site. The staff examined two letters

[3] Throughout, WCPB has maintained that it was somehow entitled to special treatment because it was not represented by counsel until after its application was dismissed in May 1985. Further, it has referred to a "stated Commission policy of reluctance to dismiss applications, particularly non-commercial applications" and an "established Commission policy of patience toward, and adequate warning to unrepresented non-commercial applicants like WCPB." We are unaware of any policy which promotes the kind of special treatment to which WCPB refers. Contrary to WCPB's assertions, its decision not to initially retain counsel was a private one having no impact on the Commission's decision-making process in this matter. *See CSJ Investments, Inc.*, 5 FCC Rcd 7653, 7654 (1990). With regard to our policy on incomplete and defective AM and noncommercial educational FM applications, the Commission has a policy of *nunc pro tunc* acceptance of applications cured by a relatively minor amendment submitted within 30 days following dismissal or return. *See Commission Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, 56 RR 2d 776, 778 (1984). In the instant case, none of the amendments promised by WCPB, or requested from WCPB by the staff, were ever filed, either before or within 30 days after dismissal of its application.

[4] In the *Hughes-Moore* case, the authenticity of a copy of an FCC stamped filing was disputed when neither the Commission nor the parties had a record of initially receiving the pleading in question. We stated that when the filing of such a document is in dispute, the applicant "has the initial burden to show that the document was properly delivered to the Commission when there is no record of such a filing in the Commission's files." Further, if the applicant used regular mail service, it "must submit proof that the mailed document was properly addressed to the Commission, had sufficient postage, and was deposited in the mail." 7 FCC Rcd at 1455, citing *In re Yoder Co.*, 758 F.2d 1114, 1118 para. 4 (6th Cir. 1985); and *Simpson v. Jefferson Standard Life Insurance Company*, 465 F.2d 1320 (6th Cir. 1972). Additionally, the type of proof that must be submitted is not materially affected if a delivery service other than the mail is used. *Id.*

from the Director of Broadcast Operations at Kingsborough Community College ("KCC"), the apparent owner of the original transmitter site, to an engineering consultant for WCPB and to the Chairman of WCPB. In the letter addressed to the Chairman of WCPB, the Director of Broadcast Operations at KCC stated that consent for site use was withdrawn because of the perceived impropriety of having "a part of the New York City Educational system" involved "in a challenge against another part."[5] Apparently, KCC is affiliated with the Board of Higher Education, which in turn is affiliated with the State Education Department. Likewise, the City Board of Education is affiliated with the State Education Department. It is not unreasonable for one local government entity to decline to allow its property to be used by an organization prosecuting an application at the Commission which is being challenged by another local government entity. We disagree with WCPB that the staff should have taken this opportunity to examine whether the City Board of Education possesses the necessary qualifications to remain a Commission licensee.[6] There is nothing in the record before us to demonstrate that withdrawal of permission by KCC for WCPB to use its site was somehow fueled by improper motives. WCPB's speculation regarding this matter does not warrant reversal of the staff's action.

CONCLUSION AND ORDERING CLAUSE

13. As discussed above, we find that WCPB's application to share time with WNYE was properly dismissed by the staff pursuant to 47 C.F.R. §73.3568(b) and its petition for reconsideration of that action was properly denied.

14. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on May 23, 1988, by Westchester Council for Public Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[5] WCPB notes that the staff, in its letter denying reconsideration, apparently mischaracterized the relationship that exists between the Board of Higher Education, the City Board of Education and KCC. The staff letter asserted that because these three entities were affiliated, permission was withdrawn to use the original site in order to avoid any conflict between the various factions of the organization and to maintain harmony within the ranks. WCPB points out, however, that while the Board of Higher Education and the City Board of Education are both affiliated with the State Education Department, the two boards are not in any other way connected with each other. Also, WCPB points out that while KCC is affiliated with the Board of Higher Education, it has no official relationship whatsoever with the City Board of Education. In any event, we find that WCPB's assertions with regard to these matters are not of decisional significance.

[6] WCPB faults the staff for not "invoking the proper precedent" in making its determination. However, the case WCPB relies upon as an example of an applicant's improper efforts to deny available transmitter sites to its competitor, *Alabama Citizens for Responsive Public Television*, 69 FCC 2d 1061 (1978), is not analogous to the instant case. In *Alabama*, a noncommercial educational television licensee whose several license renewal applications had already been denied, sought to extend its own exclusive rights to two of the leased sites for those facilities. In one renegotiated lease, the licensee extended its rights to the antenna and transmitter site for 5 years beyond the time the site ceased to be used for its studio and transmission tower. Moreover, unlike here, it was noted in *Alabama* that apparently neither of the site owners involved was opposed to making its site available to another applicant. The staff examined this precedent fully in its reconsideration letter and correctly determined that the situation it was presented with was not similar to the facts in *Alabama*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-271

In the Matter of

Amendment of Section 73.202(b),	RM-8102
Table of Allotments,	
FM Broadcast Stations.	
(Mountain Pine, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 30, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 7606 (1992), issued in response to a petition filed on behalf of Mark Jones ("petitioner") proposing the allotment of Channel 270A to Mountain Pine, Arkansas, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal. No other comments were received.

2. We believe the public interest would be served by allotting Channel 270A to Mountain Pine since it could provide a first local aural transmission service to the community. As indicated in the *Notice*, Channel 270A can be allotted to Mountain Pine in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Mountain Pine, Arkansas, as follows:

City	Channel No.
Mountain Pine, Arkansas	270A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications for Channel 270A at Mountain Pine, Arkansas, will open on **May 14, 1993,** and close on **June 14, 1993**.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 270A at Mountain Pine are 34-34-18 and 93-10-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-276

In the Matter of

Amendment of Section 73.202(b),	RM-8113
Table of Allotments,	
FM Broadcast Stations.	
(Arvin, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 30, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 7837 (1992), issued in response to a petition filed on behalf of Farmworkers Communications, Inc. ("petitioner") proposing the allotment of Channel 223A to Arvin, California, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal. No other comments were received.

2. We believe the public interest would be served by allotting Channel 223A to Arvin since it could provide a first local aural transmission service to the community. As indicated in the *Notice*, Channel 223A can be allotted to Arvin in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 11.0 kilometers (6.8 miles) east of the community.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Arvin, California	223A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications for Channel 223A at Arvin, California, will open on **May 14, 1993,** and close on **June 14, 1993**.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 223A are 35-12-56 and 118-42-22. The site restriction is required to avoid a short spacing to the licensed site of Station KIWI(FM), Channel 221A, Bakersfield, California, at coordinates 35-22-08 and 119-00-14, as well as to the licensed site of Station KDDB(FM), Channel 223B, Paso Robles, California, at coordinates 35-21-37 and 120-39-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-203

In the Matter of

Amendment of Section 73.202(b), RM-8057
Table of Allotments,
FM Broadcast Stations.
(Indiantown and Okeechobee,
Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1993; Released: March 30, 1993

By the Chief, Allocations Branch:

1. At the request of Okeechobee Broadcasters, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5624 (1992), proposing the reallotment of Channel 276C2 from Okeechobee, Florida, to Indiantown, Florida, and the modification of Station WOKC(FM)'s license to specify Indiantown as its community of license. Petitioner and Gross Communications Corporation ("Gross"), licensee of Station WLOQ(FM), Winter Park, Florida, filed comments.

2. Petitioner and Gross filed comments, proposing a change in the reference coordinates at Indiantown. Petitioner states that the coordinates it initially requested and proposed in the *Notice* (27-12-55 and 80-31-50), conflict with pending applications for Station WLOQ(FM), Winter Park, Florida (BPH-920527IE), and Station WSGL(FM), Naples, Florida (BPH-920527IG). Petitioner proposes the use of alternate coordinates at Indiantown to eliminate the conflict with these applications.

3. We believe the public interest would be served by reallotting Channel 276C2 from Okeechobee to Indiantown, Florida, and by modifying Station WOKC(FM)'s license. Petitioner has demonstrated that the reallotment would result in a preferential arrangement of allotments. Indiantown, an unincorporated, Census Designated Place in Martin County, Florida, with a 1990 U.S. Census population of 4,794 persons will be provided with its first local aural transmission service. Okeechobee (population 4,943) will continue to receive local aural transmission service from Station WOKC(AM) and non-commercial Station WWFR(FM).

4. Channel 276C2 can be allotted to Indiantown in compliance with the Commission's minimum distance separation requirements at petitioner's alternate site. As we have stated previously, we will, to the extent possible, attempt to accommodate applications for transmitter sites by modifying a rule making proposal to specify an alternate site. *See, e.g., Warrenton, Georgia*, 6 FCC Rcd 5174 (1991).[1] In accordance with Section 1.420(i) of the Commission's Rules, we will modify the license for Station WOKC(FM) to specify Indiantown, Florida, as its community of license.

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Indiantown, Florida	276C2
Okeechobee, Florida	----

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WOKC(FM), Channel 276C2, IS MODIFIED, to specify Indiantown, Florida, in lieu of Okeechobee, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Okeechobee Broadcasters, Inc., licensee of Station WOKC(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

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[1] The coordinates for Channel 276C2 at Indiantown are North Latitude 27-11-55 and West Longitude 80-21-37.

This proposal was filed prior to the effective date of *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. pend.*

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-66

In the Matter of

Amendment of Section 73.202(b), RM-8192
Table of Allotments,
FM Broadcast Stations.
(Huntsville and Willis, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: March 30, 1993

Comment Date: May 20, 1993
Reply Comment Date: June 4, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by New Wavo Communication Group, Inc. ("petitioner"), licensee of Station KVST-FM, Channel 279C3, Huntsville, Texas, requesting the reallotment of Channel 279C3 from Huntsville to Willis, Texas. In addition, petitioner requests the modification of its construction permit for Channel 279C3 at Huntsville to specify Willis as the community of license. Petitioner states that it will apply for Channel 279C3, if reallotted.

2. Petitioner states that its proposal will result in a preferential arrangement of allotments because it provides Willis with its first local aural transmission service. In support of its request, petitioner notes that Willis is an incorporated city with a 1990 U.S. Census population of 2,764 persons. Petitioner submits that Willis is a self-governing community with a complement of civil, educational, medical, and municipal facilities. To this end, petitioner states that the reallotment of Channel 279C3 to Willis will still leave Huntsville with four local transmission services while providing Willis with its "first local service".[1]

3. We believe the proposal warrants further consideration since it could provide Willis with its first FM transmission service and not deprive Huntsville of its only aural transmission service. Channel 279C3 can be allotted to Willis in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.3 kilometers (3.3 miles) northwest to accommodate petitioner's desired site.[2] As requested, we also propose to modify petitioner's authorization for Station KVST-FM at Huntsville to specify Willis as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 279C3 at Willis or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. Petitioner is requested to provide information regarding reception service losses and gains that would result from adoption of this proposal, as well as any other information regarding the public interest benefits of this proposal.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Huntsville, Texas	259A, 269A 279C3	259A, 269A
Willis, Texas	--	279C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 20, 1993,** and reply comments on or before **June 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Rosslyn, Virginia 22209
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of

[1] The stations are KCEY-FM, KSAM-AM/FM, and KYLR-AM.
[2] The coordinates for Channel 279C3 at Willis are North Latitude 30-26-55 and West Longitude 95-31-48.

evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-67

In the Matter of

Amendment of Section 73.202(b), RM-8114
Table of Allotments,
FM Broadcast Stations.
(Globe, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: March 30, 1993

Comment Date: May 20, 1993
Reply Comment Date: June 4, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Linda C. Potyka ("petitioner"), permittee of Station KRXS(FM), Channel 247A, Globe, Arizona, seeking the substitution of Channel 247C3 for Channel 247A and modification of her permit accordingly to specify operation on the higher powered channel. Petitioner stated her intention to apply for Channel 247C3 if allotted to Globe, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 247C3 for Channel 247A at Globe since it could provide an enhanced service to the community. Channel 247C3 can be allotted to Globe at the petitioner's specified site, located 12.4 kilometers (7.7 miles) southwest of the community,[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules. However, since Globe is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government to the proposal.

3. Since the petitioner's modification request at Globe conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the permit of Station KRXS(FM) without entertaining competing expressions of interest in the use of Channel 247C3 at that community, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Globe, Arizona, as follows:

City	Channel No. Present	Proposed
Globe, Arizona	247A, 262C	247C3, 262C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 20, 1993,** and reply comments on or before **June 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates at the petitioner's specified site for requested Channel 247C3 at Globe are 33-17-37 and 110-50-09. Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-68

In the Matter of

Amendment of Section 73.202(b), RM-8130
Table of Allotments,
FM Broadcast Stations.
(Paradise Valley, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: March 30, 1993

Comment Date: May 20, 1993
Reply Comment Date: June 4, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Scottsdale Talking Machine & Wireless Company, Inc. ("petitioner"), permittee of Station KXLL(FM), Channel 290A , Paradise Valley, Arizona,[1] seeking the substitution of Channel 290C3 for Channel 290A and modification of its authorization accordingly to specify operation on the higher powered channel. Petitioner failed to state its intention to apply for Channel 290C3 if allotted to Paradise Valley, and is requested to do so in its comments.

2. We believe the public interest would be served by proposing the substitution of Channel 290C3 for Channel 290A at Paradise Valley since it could provide an enhanced service to the community. Channel 290C3 can be allotted to Paradise Valley at the petitioner's currently authorized site,[2] consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules.[3] [4] However, since Paradise Valley is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government in the proposal.

3. The petitioner's modification request at Paradise Valley conforms with the provisions of Section 1.420 of the Commission's Rules. Therefore, we shall propose to modify the petitioner's Class A authorization for Station KXLL(FM) without entertaining competing expressions of interest in the use of Channel 290C3 at Paradise Valley, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Paradise Valley, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Paradise Valley, Arizona	290A	290C3

5. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the licensee of Station KONC-FM and to Hope Valley FM Limited Partnership, as follows: Resource Media, Inc., Radio Station KONC-FM, 7401 W. Camelback Road, Phoenix, Arizona 85033; Hope Valley FM Limited Partnership, 9121 North Kober Road, Paradise Valley, Arizona 85253.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **May 20, 1993,** and reply comments on or before **June 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036

[1] Petitioner advises that the grant of its construction permit application (File No. BPH-870909MF), 6 FCC Rcd 1668 (I.D. 1991), *aff'd.*, 6 FCC Rcd 4185 (Rev. Bd. 1991), *aff'd.*, 7 FCC Rcd 4422 (1991), has been appealed to the D.C. Circuit, *Hope Valley FM Limited Partnership v. F.C.C.*, Case No. 92-1355.

[2] Coordinates at the site specified in the construction permit issued for Station KXLL(FM) at Paradise Valley are 33-32-30 and 111-57-12. Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

[3] The proposal for Channel 290C3 is short-spaced to Station KONC-FM, Channel 292A, Sun City, Arizona, at coordinates 33-36-05 and 112-17-31, and therefore dependent upon Station KONC-FM moving to Channel 292C2 in accordance with the modification provisions set forth in the *Report and Order* in MM Docket No. 92-66. *See* 8 FCC Rcd 796 (1993). Therefore, since the Paradise Valley allotment proposal is dependent upon the grant of a license to Station KONC-FM on Channel 292C2, the issuance of a license to petitioner for Channel 290C3 at Paradise Valley may be withheld until Station KONC-FM is authorized to operate on its new channel. The licensee of Station KONC-FM will be served with a copy of this *Order*.

[4] As indicated at note 1, *supra*, there is currently pending before the Court of Appeals a request by Hope Valley FM Limited Partnership ("Hope Valley") to review the Commission's decision affirming the denial of its comparative application at Paradise Valley (File No. BPH-870910ME). As a result, the petitioner's instant modification request is conditioned on the outcome of the appeal. We will serve a copy of this *Notice* on Hope Valley.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-142

In re Applications of

ALGREG CELLULAR ENGINEERING — File No. 10607-CL-P-307-A-89 *et al.*

For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin *et al.*

ORDER

Adopted: March 22, 1993; Released: March 30, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The *Initial Decision* of Administrative Law Judge Walter C. Miller, 92D-64, 7 FCC Rcd 8686, in the above-captioned proceeding was released on December 22, 1992. TNT Communications has failed to file timely exceptions to this decision. Therefore, pursuant to § 1.276(f) of the Commission's rules, 47 § 1.276(f), its application will be dismissed for failure to prosecute.

2. ACCORDINGLY, IT IS ORDERED, That the applications of TNT Communications for facilities in the Domestic Public Cellular Telecommunications Radio Service, File No. 10233-CL-P-582-A-89, on Frequency Block A, in Market 582, North Dakota 3 - Barnes, and File No. 10678-CL-P-727-A-89, on Frequency Block A, in Market 727, Puerto Rico 5 - Ceiba, ARE DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-35

In the Matter of

Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz — RM-7986

NOTICE OF PROPOSED RULE MAKING

Adopted: February 18, 1993; Released: March 31, 1993

Comment Date: May 6, 1993
Reply Comment Date: May 21, 1993

By the Commission:

I. INTRODUCTION

1. By this *Notice*, we propose to amend Part 90, Subpart P of our rules[1] governing private carrier paging (PCP)[2] service in the 929-930 MHz band to grant channel exclusivity to qualified local, regional, and national paging systems. Our proposal is based in part on a Petition for Rule Making filed by the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER).[3] We propose to adopt some elements of the NABER proposal and to modify others.

2. Under our proposal, PCP systems consisting of six or more transmitters would be entitled to channel exclusivity in most service areas, and larger systems could obtain regional or nationwide exclusivity. This proposal would be implemented on 35 of the 40 private paging channels at 900 MHz, while five channels would continue to be assigned on a non-exclusive basis. To qualify for exclusivity, PCP licensees would be required to construct their systems within eight months of licensing, with "slow growth" extensions allowed under some circumstances. Existing systems that meet the new criteria would obtain immediate exclusivity, and all other existing systems would be grandfathered. We solicit comments on the merits of exclusivity for PCP systems generally and on the specifics of this proposal.

II. BACKGROUND

A. Development Of 900 MHz Private Carrier Paging Rules.

3. In 1982, we initiated PCP service in the 900 MHz band by creating 40 private paging channels at 929-930 MHz.[4] Originally, 10 of these channels were allotted to commercial service while 30 were set aside for non-commercial use.[5] In 1985, in response to growing demand for commercial channels, we reallotted the 929-930 MHz band to make 20 channels available for commercial use, and further authorized inter-pool sharing of channels.[6]

4. In establishing 900 MHz paging service, we elected to assign PCP frequencies on a non-exclusive basis.[7] We reasoned that channel sharing was feasible because one-way paging service requires less channel capacity than two-way communications. We also noted that technological advances were increasing potential channel capacity, and that non-exclusive channel assignments had been successful on lower band paging channels.[8] We therefore decided to rely solely on frequency coordination and licensee cooperation to promote efficient channel use and prevent interference.

B. Utilization Of Private Carrier Paging Frequencies.

5. In the ten years since the inception of 900 MHz paging service, the paging marketplace has changed dramatically. Hundreds of private paging operators are now licensed and in operation. Paging technology has improved while the average cost of service has declined.[9] Paging services are increasingly being offered on a wide-area basis through regional and nationwide paging systems, and subscribership has been growing at an annual rate of 15 to 20 percent. Based on these trends, industry analysts project that more than 20 million units will be in service by the mid-1990s.[10]

6. To meet this growing demand, paging companies have occupied much of the available spectrum on common carrier paging channels and on PCP channels below 900 MHz. Common carrier channels, which are assigned on an exclusive basis, have been allotted in virtually all major

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[1] In our recently initiated "refarming" rule making, we have proposed to replace the current Part 90 in its entirety with a new Part 88. *See Notice of Proposed Rule Making*, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992). Aside from this transposition, however, the refarming rule making does not propose any change to the rules that are the subject of this proceeding. Should the refarming proposal be adopted prior to a decision in this proceeding, we will amend this proposal to refer to the appropriate sections of Part 88. Otherwise, any changes made to Part 90 as a result of this proceeding will be incorporated into the refarming proposal to the extent it is ultimately adopted.

[2] As used herein, the term "private carrier paging" is intended to encompass both commercial and non-commercial private paging channels above 900 MHz, as well as well as paging-only channels at 150 and 460 MHz in the Business Radio Service.

[3] Petition For Rule Making, RM-7986, filed April 24, 1992.

[4] *First Report and Order*, Gen. Docket No. 80-183, 89 FCC 2d 1337 (1982) (*"First 900 MHz Paging Order"*); *Second Report and Order*, Gen. Docket No. 80-183, 91 FCC 2d 1214 (1982) (*"Second 900 MHz Paging Order"*). At the same time, we allocated forty channels in the 930-931 MHz band for common carrier paging services.

[5] *Second 900 MHz Paging Order* at paras. 30-31.

[6] *Report and Order*, PR Docket 85-102, 58 RR 2d 1290 (1985).

[7] *Second 900 MHz Paging Order* at para. 32.

[8] *Id.*

[9] *See* "1992 Survey of Mobile Radio Paging Operators," *Communications*, October 1992, at 18-24.

[10] *See* "Survey Shows Paging Growth and Predicts Stable Revenue," *Telocator*, August/September 1992, at 20.

markets. PCP channels at 150 and 460 MHz, which are assigned on a non-exclusive basis, have become increasingly crowded as well, particularly in urban areas.

7. Historically, the 900 MHz PCP channels have been less heavily used than other paging frequencies. Nevertheless, demand for these frequencies has increased as alternative spectrum grows scarce. In response to this demand, we allotted additional PCP channels to commercial use and authorized inter-pool sharing in 1985.[11] In 1991, we began to explore further alternatives to promote efficient use of these channels and temporarily froze applications for new 900 MHz PCP licenses.[12] Since the freeze was lifted, we have received numerous additional applications. While some of this activity is probably attributable to anticipation of regulatory action, we believe it also reflects genuine demand for new paging services on these channels.

C. NABER Petition For Rule Making.

8. On April 24, 1992, NABER filed a Petition for Rule Making proposing channel exclusivity for 900 MHz PCP systems that contain a defined number of transmitters in a given area. The Petition states that this rule change will foster the development of local, regional, and nationwide paging systems and will prevent the type of congestion that has occurred on lower band PCP channels.[13] NABER also argues that its proposal will encourage lower band licensees to migrate to available 900 MHz channels.[14]

9. Specifically, the NABER proposal calls for channel exclusivity for three categories of paging system: (1) local systems consisting of at least 6 transmitters, except in the New York, Chicago, and Los Angeles urban markets, where 18 transmitters would be required; (2) regional systems containing at least 70 transmitters in no more than 12 contiguous states; and (3) nationwide systems, which would consist of at least 300 transmitters distributed in any manner.[15] In the case of qualified local and regional systems, NABER proposes to bar co-channel transmitters within 70 miles of any transmitter in the system. In the case of qualified nationwide systems, the NABER proposal would prohibit co-channel sharing anywhere in the country.[16]

10. As proposed by NABER, existing 900 MHz PCP systems that meet the above criteria would immediately qualify for exclusivity. Applicants proposing to build new qualifying systems would have eight months to construct the required transmitters.[17] Applicants proposing to build more than 30 sites would be entitled to seek a "slow growth" extension of construction.[18] All transmitters counted towards the number required for exclusivity would be subject to minimum technical standards.[19]

D. Comments In Response To The NABER Petition.

11. By public notice, we solicited comments on NABER's petition.[20] In general, the proposal is supported by 900 MHz PCP licensees.[21] While acknowledging that 900 MHz PCP channels have not yet become congested, the Petition's supporters argue that such congestion will occur in the future unless exclusivity is implemented.[22] Supporters contend that co-channel sharing results in inferior service quality and discourages development of wide-area and nationwide paging systems.[23] Supporters also argue that the capital investment needed to build a qualifying system will be sufficient to prevent speculation and warehousing of channels.[24]

12. Two other PCP operators, Dial-A-Page and Metagram America, favor the proposal in part but also propose modifications. Dial-A-Page generally supports exclusivity for local and regional systems, but objects to NABER's criteria for nationwide exclusivity as arbitrary and unduly favorable to current operators of large PCP systems.[25] Dial-A-Page further argues that we should apply loading standards as a prerequisite for exclusivity and that exclusivity should be extended to lower-band PCP systems.[26] Metagram also supports loading standards and argues that nationwide exclusivity should be given only to systems that actually offer nationwide coverage.[27]

13. Opposition comments were filed by Mobile Telecommunications Technologies Corporation (MTel), which operates a nationwide common carrier paging system, and Dial Page, an operator of both common carrier and lower-band PCP systems. We also received identical form comments opposing the petition from approximately 25 PCP licensees operating at 150 and 460 MHz.[28] In general, opponents argue that NABER has not provided evidence of spectrum congestion in the 900 MHz band to justify its proposal.[29] Opponents also stress that the NABER proposal would grant nationwide exclusivity to six existing PCP systems, thus reducing the number of channels available to other potential users.[30] Finally, opponents contend that the proposal would lead to warehousing of channels and would frustrate new entry by competing paging services.[31]

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11 *Report and Order*, PR Docket 85-102, 58 RR 2d 1290 (1985).

12 *Order*, Acceptance of 929-930 MHz One-Way Paging Applications, DA 91-1257, released October 7, 1991.

13 NABER Petition at 7-8.

14 *Id.* at 8.

15 *Id.* at 10-12.

16 *Id.*

17 *Id.* at 12-14.,

18 *Id.* at 13.

19 *Id.* at 14.

20 Rep. No. 1889, May 11, 1992. A list of parties commenting on the Petition is set forth in Appendix C.

21 *See, e.g.*, Comments of Paging Network, PageMart, PacTel Paging, and Comtech. The NABER petition was developed after extensive discussion and debate by these and other PCP operators over the course of the previous year. NABER Reply Comments at 5-7. We are mindful that the NABER proposal represents a serious effort by the private paging industry to achieve consensus among sometimes divergent interests. At the same time, to the extent that there are PCP operators (particularly in the 900 MHz band) who have objections to the proposal, we will consider their comments carefully.

22 *See, e.g.*, PageNet Comments at 2, PageMart Reply Comments at 3.

23 *See, e.g.*, PageNet Comments at 12-13, PacTel Comments at 3-4.

24 *See, e.g.*, PageMart Reply Comments at 7-8, Comtech Reply Comments at 2.

25 Dial-A-Page Comments at 4-5.

26 *Id.* at 2-3.

27 Metagram Reply Comments at 2-3.

28 *See, e.g.*, Comments of South Central Communications Corporation. These commenters contend that by allowing large paging companies to obtain nationwide exclusivity, the proposal would discourage migration by lower band licensees.

29 *See, e.g.*, Dial Page Comments at 2-3.

30 *See, e.g.*, MTel Comments at 5.

31 *See, e.g.*, Dial Page Comments at 7.

III. DISCUSSION

A. Benefits Of Exclusivity.

14. The proposal to allow exclusive use of PCP channels requires a careful balancing of interests. At the time of our original 900 MHz rule making, we felt that PCP services could develop successfully on a shared-use basis while exclusive channel assignments could lead to under-utilization of spectrum. More recently, the rapid evolution of the paging market has revealed problems with sharing frequencies and potential benefits from granting some form of channel exclusivity to PCP systems.

15. As paging channels are occupied by an increasing number of competing service providers, the sharing of frequencies, while technically feasible, threatens to discourage optimally efficient use. Paging operators on a common frequency must invest in monitoring or interconnection equipment, adding to their costs. Because air time on shared frequencies must be allotted among multiple users, message transmission is often delayed. According to some PCP operators, frequency sharing has inhibited the development of wide-area paging systems that rely on high-speed technologies.[32] Paging operators are reluctant to invest in such technologies when they may be required, in effect, to turn their systems off periodically to accommodate other users. To date, these difficulties have been most evident in the 150 and 460 MHz bands, while 900 MHz licensees have generally not been required to share frequencies. As demand for paging channels accelerates, however, the problems that have affected lower band service are increasingly likely to affect the 900 MHz channels.

16. In light of these developments, we believe it would be desirable to establish some form of channel exclusivity for 900 MHz PCP systems.[33] Granting qualified licensees exclusive rights to a channel will eliminate the inefficiencies inherent in sharing channels. Exclusivity will also create a more stable, predictable environment for licensees by eliminating the risk that other users will be assigned the same channel in their service area. Thus, licensees will have greater incentive to invest in technology and to develop higher-capacity paging systems.

17. We also believe that exclusivity should be implemented sooner rather than later, notwithstanding the relative lack of crowding on 900 MHz PCP channels at present. The purpose of granting exclusive channel rights is to prevent congestion before it occurs. So long as the 929-930 MHz band is not heavily used, we have the flexibility to modify our frequency allotment policy with little impact on existing service. If we choose to maintain the *status quo* until crowding occurs, however, we will lose that flexibility and may be unable to implement any new approach at all. By the same token, if the demand for spectrum turns out to be less than is anticipated, implementing exclusivity will not deprive us of the flexibility to respond to future changes in the paging marketplace.

B. Configuration Of Protected Systems.

18. Under NABER's proposal, individual PCP stations would not receive automatic exclusivity, but a licensee would be entitled to earn exclusivity by constructing a system comprised of multiple transmitters. We generally concur with this approach. First, we believe that our rules should encourage the development of multi-transmitter systems, which typically provide a wider coverage area and greater flexibility to customers than single-transmitter systems. Second, a multi-transmitter approach requires licensees to make a significant capital investment to build a qualifying system, thereby discouraging warehousing and speculation. To achieve these goals, however, we believe that some aspects of NABER's proposal should be modified. We request comments on the technical basis and practical effect of the NABER proposal and our proposed modifications. We also invite commenters to discuss further modifications or alternatives that would promote the general objectives of this proceeding.

1. Local systems.

19. In all but the three largest metropolitan markets, NABER proposes to grant local exclusivity to any PCP system comprised of at least six contiguous transmitters; in the top three markets, 18 contiguous transmitters would be required. To be "contiguous," each transmitter would have to be located within 20 miles of at least one other transmitter in the system. Channel exclusivity would be based on a standard 70-mile separation between any transmitter in the system and all co-channel stations. While these criteria are generally supported by those in favor of the petition, we propose to modify them in some respects.

a. Number of transmitters.

20. NABER's proposed six-transmitter requirement for local exclusivity appears to establish a reasonable threshold for obtaining an exclusive channel assignment. A six-transmitter minimum should ensure adequate coverage in most markets, and the required capital investment is likely to discourage frivolous applications. In fact, we expect that many PCP licensees will use more than six transmitters to provide local coverage. A significantly higher threshold, however, would unduly favor larger PCP systems, would impose an unfair barrier for new 900 MHz entrants, and could cause licensees to build systems with more transmitters than are actually needed. At the same time, we tentatively conclude that most systems with five or fewer transmitters do not require exclusivity, and that a lower minimum would unacceptably increase the risk of specula-

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[32] *See, e.g.*, PageNet Comments at 12-13. Wide-area systems typically transmit simultaneously to all points, and some of the larger systems are moving to initial distribution of signals by satellite. If the frequency is shared, however, the entire system may be required to operate on a part-time basis in order to accommodate a paging system that serves a much smaller area. The potentially disproportionate effect of non-exclusivity on wide-area systems is an obvious disincentive to investment in such systems.

[33] MTel contends that allowing PCP exclusivity would violate Section 332 of the Communications Act by eliminating the "last functional distinction" between private and common carrier paging. MTel Comments at 15-16. We disagree with this contention. First, as discussed herein, our proposal for PCP exclusivity differs from our rules governing common carrier paging in several key respects. Second, the legal distinction between private and common carriage does not turn on whether frequency assignments are exclusive or shared, and there are numerous private services that already have exclusivity. We do not agree with MTel that this rule making requires us to conduct a broad review of common versus private carrier regulation. Such an inquiry, if appropriate, is beyond the scope of this proceeding.

tion.[34] We request comment on these tentative conclusions, and urge commenters favoring a different approach to provide technical support for their position.

21. We also tentatively conclude that in the three largest urban markets, more transmitters may be required to ensure that exclusive frequencies are not assigned to operators who lack the resources or commitment to serve these markets. NABER's proposed minimum, however, is lacking in technical support: we note that under our current height and power limits, a licensee could cover each of these markets with fewer than 18 transmitters. We therefore solicit further comment on an appropriate threshold for the top three markets. We also request comment on whether such a threshold should be applied to any other major markets and whether there should be additional prerequisites for exclusivity in these markets.

b. Contiguous transmitters.

22. Under NABER's proposal, each transmitter in a qualified system would have to be within 20 miles of another transmitter to count toward the number required for exclusivity. We propose to increase the maximum distance to 25 miles, which is more compatible with our height and power limits for PCP transmitters and will result in less signal overlap for high-power operations. NABER does not propose a minimum distance between contiguous stations. To prevent "clustering" of multiple transmitters solely to meet the minimum threshold, we propose to prohibit licensees from using co-located transmitters to qualify for exclusivity.[35] We request comments on these proposals.

c. Separation standard.

23. We solicit comment on whether NABER's proposed 70-mile separation standard for co-channel stations should be modified. While a uniform standard is simple to administer, it does not vary based on a system's actual transmission range. As a result, licensees receive the same protection regardless of the area they actually proposed to serve. A more flexible alternative would be to base the separation between co-channel transmitters on actual antenna height and transmitter power. We have recently adopted this approach for 900 MHz common carrier paging frequencies, replacing a uniform separation standard with a variable table.[36] In our view, the same flexibility should be available to qualified PCP systems as well and can be achieved without the licensing process becoming significantly more complex or burdensome.[37]

2. Regional systems.

24. Under NABER's proposal, transmitters in qualified regional systems (comprised of 70 or more transmitters) would receive the same co-channel protection as local system transmitters. Unlike local systems, however, regional systems would be entitled to protection for non-contiguous transmitters, so long as they are situated in no more than 12 adjacent states.[38] We generally agree that this proposed standard would encourage the development of regional paging systems. We are concerned, however, that & NABER's proposal could also result in the "blocking out" of significant markets through strategic placement of non-contiguous transmitters. Therefore, we propose that to obtain channel exclusivity in any of the top thirty markets,[39] a regional system operator must construct enough contiguous transmitters (as defined in the rules for local systems) to meet the criteria for local exclusivity in that market.

3. Nationwide systems.

25. NABER's proposed nationwide exclusivity for PCP systems consisting of 300 or more transmitters has generated the most controversy between supporting and opposing commenters. Petition supporters argue that nationwide exclusivity is appropriate for those licensees who are prepared to make such a substantial investment. Opponents contend that the absence of any geographic criteria in the NABER proposal would enable a PCP licensee to preempt use of its frequency in regions of the country that its system did not actually cover.

26. In our view, PCP licensees who invest in a system that provides service on a national scale should be entitled to nationwide exclusivity. We tentatively conclude that construction of 300 transmitters is an adequate threshold to qualify for nationwide exclusivity and request comment on this standard. We also believe, however, that a geographic distribution requirement should be added to ensure significant coverage of major markets in all regions of the country. Therefore, we propose that to obtain nationwide exclusivity, a PCP licensee must provide service to fifty or more markets, including at least twenty-five of the top fifty markets. In addition, we propose to divide the continental

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[34] We recognize that in some instances, a licensee may be able to achieve the same coverage provided by a low-power six-transmitter system by using a smaller number of high-power transmitters. We request comment on whether the number of transmitters required for exclusivity should vary depending upon the power output of the system.

[35] Under our proposal, multiple transmitters installed on an antenna farm or similar facility would be considered co-located. A licensee would be allowed to install multiple transmitters at a single location, but only one such transmitter would be counted toward the number required to qualify for exclusivity.

[36] *See* 47 C.F.R. §§ 22.502(c), 503(d). Until recently, 900 MHz common carrier paging allocations were based on a standard 70-mile separation between stations. *See First 900 MHz Paging Order*, 89 FCC 2d 1337 at para. 57. In 1990, however, we adopted a table setting varied separation distances (from 70 to 171 miles) based on antenna height and ERP. *Order on Reconsideration*, Height and Power Increases in the Public Mobile Service, CC Docket No. 88-135, 5 FCC Rcd 4604 (1990), at para. 33. If this table were adopted for 900 MHz PCP systems, the impact would be slightly different than for common carrier paging systems. First, the required separations would apply only to transmitters in qualified multi-transmitter systems, not to all individual transmitters. Second, applying current PCP height and power limits, the maximum separation allowed by the table would be 116 miles. We solicit comment on both the suitability of this approach for PCP services and the specific separation distances proposed.

[37] Although a 70-mile separation would remain the smallest possible separation under our current proposal, we are also considering the option of allowing licensees to obtain short-spaced separations based on an appropriate showing. We have adopted such an approach in licensing SMRs, *see Report and Order*, PR Docket 90-34, 6 FCC Rcd 4929 (1991), and request comments on the feasibility of applying the same or a similar standard to PCP services.

[38] NABER Petition at 11.

[39] *See* 47 C.F.R. § 90.741.

United States into seven regions, modelled on the seven RBOC regions,[40] and require that nationwide licensees serve at least two markets in each of these regions.

27. We believe this standard will distinguish paging systems that provide truly national service from systems that are essentially regional in character. As always, our goal is to create a competitive mobile communications marketplace. We encourage commenters to address the issue of whether our proposal for nationwide exclusivity furthers this goal or whether less intrusive options are available. In addition, given the concerns expressed by some commenters that nationwide exclusivity could lead to speculation and spectrum warehousing, we request comment on whether our proposal satisfactorily addresses such concerns. Finally, we seek comment on whether additional requirements may be needed to ensure that nationwide licensees provide adequate coverage to less densely populated regions (e.g., should we require nationwide systems to cover a minimum land area or percentage of the population in each region).

C. Allotment of Channels.

28. Under the NABER proposal, channel exclusivity would be available on all 40 PCP channels, with no distinction made between the commercial and non-commercial pools. Petition opponents criticize this proposal as too favorable to the largest PCP operators, who they predict will crowd out smaller systems and non-commercial licensees. We regard this criticism as overstated: opportunities for large regional and nationwide operators to expand will be balanced by the protection that the proposed rules provide to smaller regional and local systems. Moreover, as discussed in Section E below, we propose to grandfather existing systems to protect the interests of those too small to qualify for exclusivity.[41]

29. We propose, however, to reserve five channels that will continue to operate under the current rules.[42] This is intended primarily to allow the continued development of small systems that operate satisfactorily on a non-exclusive basis. We anticipate that this reserve will be particularly useful to small non-commercial systems that do not need or desire an exclusive channel assignment. We do not consider it necessary to reserve these channels exclusively for non-commercial use, however, nor do we intend to prohibit non-commercial licensees from seeking exclusivity on the 35 channels that would be subject to the proposed rules. Therefore, we propose that commercial and non-commercial operators be equally eligible to apply for any PCP channel.[43] We request comments on all of these proposals.

D. Prerequisites For Channel Exclusivity.

1. Construction Period.

30. The NABER petition would allow PCP applicants eight months to construct their systems or channel exclusivity would terminate. We propose to adopt this standard, which is consistent with our existing construction window for paging licensees.[44] Conditional exclusivity would commence when the applicant's proposed system is assigned a frequency and would extend for eight months following initial licensing. If the system is not constructed and operating at the end of this period, exclusivity will be forfeited and the channel reassigned to another applicant.[45] To help expedite the recovery and reassignment of such channels, we propose to apply our "finder's preference" rules to PCP licensees who obtain exclusive frequency assignments and then fail to construct or operate their systems as proposed.[46]

31. Because construction of larger systems may take longer than eight months, NABER proposes a "slow growth" option for construction of systems with more than 30 transmitters. We request comments on this concept, which has been applied to SMR and other private radio services, and which we tentatively conclude is appropriate for PCP services as well. Under our proposal, applicants seeking to build a system comprised of more than 30 transmitters could be granted up to three years to construct based on a showing of reasonable need for the extension, a detailed construction timetable, and evidence of financial ability to construct the system.[47] As in the case of conventional applicants, a slow growth applicant's failure to com-

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[40] *See U.S. v. Western Electric*, 569 F. Supp. 1057 (D.D.C. 1983). Our proposals for regional and nationwide exclusivity apply only to the continental United States. PCP licensees in Alaska, Hawaii, and Puerto Rico would be eligible for local exclusivity only.

[41] While existing systems would be grandfathered, we do not intend to license *new* systems that do not qualify for exclusivity on frequencies that are subject to the proposed new rules. Applicants who do not seek exclusivity would be assigned to frequencies reserved for shared use.

[42] We have tentatively selected five channels from the current non-commercial frequency pool (929.0375, 929.0875, 929.1625, 929.2625, and 929.3375 MHz) for continued assignment on a non-exclusive basis. Current usage of these channels is relatively light, and should provide ample capacity for shared use by new applicants.

[43] Historically, the use of frequencies by commercial paging operators has been significantly heavier than non-commercial use. We expect this trend to continue, as most private paging customers will find it more cost-effective to "rent" service from a commercial provider than to own their own system.

[44] Under our existing rules, failure to construct and operate a base station transmitter within eight months results in termination of the license for that station. See 47 C.F.R. § 90.155. This would continue to be the case under our proposal.

[45] If a PCP applicant constructed fewer sites than proposed in the application, but the constructed system still qualified for protected status, exclusivity would be granted based on what is actually built. If the applicant constructed fewer transmitters than are needed to obtain exclusivity, it would be allowed to operate the constructed transmitters on a secondary basis, subject to being shut down or relocated if another licensee were to build a qualified system in the same area. If the applicant forfeited protected status by failing to construct, it would be barred from applying for any new authorization in the same area for one year to prevent "rolling over" protection through repetitive applications.

[46] *See Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297 (1991). In our finder's preference proceeding, we determined that the finder's preference mechanism should be applied to all frequencies in the 900 MHz band, among others, that are assigned on an exclusive basis. *Id.* at para 44.

[47] The showing required of PCP slow growth applicants would be similar to our requirements for other private radio applicants. *See* 47 C.F.R. §§ 90.629(a), 90.727(a). A possible alternative to a showing of financial ability would be to require applicants to obtain a performance bond underwriting the construction of the proposed system. We request comment on the

plete construction as proposed would result in forfeiture of exclusivity and revocation of licenses for all unconstructed transmitters.

2. Technical Standards.

32. To discourage speculative applications, NABER proposes minimum technical standards for each transmitter to be counted towards the number required for channel exclusivity. Specifically, each transmitter would be required to have 100 watts minimum output power and simulcast capability, and all transmitters would have to function together as part of a single operating system. These proposals are generally supported by the comments and appear to be reasonable in light of current paging technology.[48] We therefore propose to adopt this aspect of NABER's proposal. We solicit comments on these standards, on possible alternatives, and on whether any additional technical requirements should be imposed.

3. Loading requirements.

33. Petition opponents contend that the proposed construction and technical requirements will not prevent speculation,[49] and call for the imposition of loading standards as an additional requirement for exclusivity. We have elected not to incorporate a loading standard into our proposal.[50] While loading requirements have some advantages, we believe that the other aspects of this proposal will substantially discourage speculation. Moreover, our experience has been that loading standards are burdensome to administer and difficult to calibrate to the realities of the paging marketplace.[51]

4. Multiple channels.

34. The NABER petition does not address whether applicants would be allowed to request or obtain exclusivity on more than one frequency. We believe that restrictions are needed to prevent PCP operators from attempting to apply for multiple frequencies to block entry by potential competitors. We therefore propose that applicants for exclusive channels be limited to requesting one frequency at a time at any location. In addition, no applicant would be assigned a second frequency in a given area unless and until it completed construction and commenced operation of a qualified system in that area on the initial frequency. We request comment on this proposal and on whether any additional requirements should be imposed.

E. Application Of Proposed Rules To Existing 900 MHz Paging Systems.

1. Systems currently qualified for exclusivity.

35. Because there are already numerous PCP systems operating at 929-930 MHz, we have considered carefully how these systems would be treated under this proposal. Our tentative conclusion is that the most practical and equitable approach is to extend exclusive channel rights to all systems that qualify for such protection at the time the rules go into effect. As some petition opponents have pointed out, this would result in immediate exclusivity for some large existing PCP systems. We do not agree with opponents, however, that this would leave insufficient spectrum for new entrants. Even allowing for existing systems, there would still be significant room for new applicants on the 35 channels affected by this rule making.[52] We also do not agree with the contention that our proposal constitutes an unfair preference for existing systems. In our view, it is appropriate to grant exclusivity to licensees who are already operating systems that meet our criteria for exclusivity. This does not constitute a preference at all, but simply reflects the investment that these licensees have already made at 900 MHz when other potential applicants chose not to.[53]

2. Grandfathering of smaller systems.

36. We also propose to grandfather all existing systems that do not qualify for exclusivity. Thus, the rules prohibiting co-channel transmitters within a minimum distance of a qualified system would not apply to any transmitter authorized as of the effective date of these proposed rules. This would enable small existing systems to continue operating without being forced to change frequencies or location. In our view, some form of grandfathering is essential

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feasibility of using performance bonds in this manner, the terms that might be required in such a bond, and the appropriate bonding amount.

[48] In some instances, the proposed minimum output could cause ERP to exceed current allowable limits. *See* 47 C.F.R. § 90.494(f). In such instances, the applicable ERP limit would supersede the minimum output standard.

[49] Dial Page argues that exclusive assignment of 930-931 MHz common carrier paging channels has led to substantial warehousing, and that PCP channels will be similarly warehoused if exclusivity is adopted. Dial Page Comments at 6-7, Supplement to Reply Comments at 2-5. However, even if Dial Page's contentions about common carrier warehousing (which are based on sketchy data at best) are assumed to be true, the multiple transmitter requirement and technical standards in our PCP proposal impose a significantly higher threshold to qualify for exclusivity than is imposed on common carrier licensees.

[50] In accordance with our current rules, however, all PCP licensees will continue to be required to provide loading information in their initial license applications and when requesting license modification or renewal. *See* 47 CFR § 90.127.

[51] Some commenters have suggested basing a loading standard on the number of paging units in use. *See, e.g.*, Metagram Comments at 3. Such information is burdensome to provide on an ongoing basis, however, and does not necessarily provide an accurate picture of actual frequency use. Because of these factors, we have eliminated most end user reporting requirements previously imposed on paging licensees. *Report and Order*, Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, PR Docket 92-78, 7 FCC Rcd 6344 (1992). In that rule making, we also declined to adopt a signalling standard as a method of measuring paging channel occupancy. Although such a standard would theoretically provide better information on actual channel loading, we concluded it would be excessively complicated and unreliable in practice. *Id.* at para. 14 n.40.

[52] We estimate that the proposed rules would lead to immediate frequency protection for no more than six nationwide networks and nine regional networks. Moreover, this estimate assumes that all currently authorized construction will be completed. Thus, the number of existing licensees who actually qualify for exclusivity may be lower.

[53] Even if this were deemed a preference, the Commission has clear authority to grant preferences to existing licensees in establishing new rules. *See, e.g., Second Report and Order/Further NPRM*, Advanced Television Systems, MM Docket No. 87-268, 7 FCC Rcd 3340, 3342-3343 (1992), *recon.*, 7 FCC '4 Rcd 6924 (1992) (limiting initial eligibility for HDTV frequencies to existing broadcasters).

to protect the interests of existing licensees. At the same time, grandfathering could limit the benefits of exclusivity by requiring new licensees either to share frequencies with grandfathered licensees or to buy out their systems. We request comment on what impact grandfathering would have on existing systems and on the ability of new systems to obtain exclusive frequencies.

37. Somewhat more complicated is the question of future expansion by grandfathered systems. NABER proposes that grandfathered licensees be allowed to "expand" existing systems to qualify for exclusivity, but does not specify whether they would be allowed to encroach upon the protected area of another system. We tentatively conclude that if any preference is to be given to expansion by existing systems, it should be limited in nature and should not override the protection afforded to other licensees. Under our proposal, therefore, applications to add transmitter sites to existing systems would be treated identically with applications to establish new systems. In the case of mutually exclusive applications, however, a preference would be granted in favor of expanding the existing system. We request comments on this approach.

3. Lower band PCP systems.

38. Although the NABER proposal does not extend to 150 and 460 MHz PCP systems, NABER contends that it will ease crowding on those channels by encouraging lower band operators to migrate to available 900 MHz channels. This contention is disputed by some lower band licensees, who perceive little practical incentive or opportunity for migration. In our view, this proposal would make the 900 MHz band more attractive to lower band licensees than it is presently, but it remains to be seen whether substantial migration would occur. Even if migration is unlikely, however, we are not persuaded by the comments thus far that lower band licensees should receive a preference over other applicants in seeking 900 MHz channels. We request comments on whether such a preference is either necessary or feasible.

39. Some commenters suggest that we should combine our proposal for exclusivity in the 900 MHz band with a similar proposal for the lower band PCP channels.[54] We do not propose to take such a step in this proceeding. The degree of existing congestion in the 150 and 460 MHz bands raises obstacles to implementing exclusivity that are not present at 900 MHz. Moreover, we believe many licensees will continue to prefer the lower band channels, even on a shared basis, because of their low power requirements and equipment costs. Nevertheless, we are open to informal comments on how to promote optimally efficient use of the lower band frequencies, whether by earned exclusivity or some other means.

F. Frequency Coordination.

40. We request comment on the role of frequency coordination procedures in the assignment of frequencies under this proposal. While we have relied on coordination in the assignment of shared PCP frequencies, assigning exclusive frequencies raises different issues that may require a revised approach. Nevertheless, coordination may continue to be important to making the licensing process efficient and equitable. We therefore propose to continue to use coordination procedures, but would allow PCP applicants to use any of the three recognized frequency coordinators (NABER, ITA, or APCO) to obtain coordination. This would be consistent with similar proposals we have made affecting coordination of General Category SMR channels and frequencies below 800 MHz.[55] In our view, the licensing process will benefit from applicants having the option to select the coordinator that best meets their requirements. We seek comment on this proposal.

G. Freeze on Applications.

41. Because of the potential impact of these proposals on both existing paging systems and the future availability of 900 MHz paging channels, we believe that no new construction of 900 MHz paging facilities should be authorized during the pendency of this rule making. Therefore, we will not accept any new applications for 900 MHz paging channels from the adoption date of this *Notice* through the conclusion of this proceeding.[56] Applications accepted for filing prior to the adoption date of this notice will be processed normally, and current licensees who have not yet constructed their facilities must complete construction consistent with their existing authorizations. To minimize the impact of the freeze on potential applicants, we will proceed with this rule making on an expedited basis. Assuming the proposed rules are adopted, we propose to give qualified existing systems a thirty-day window to request protected status.[57] After requests from existing licensees are reviewed and decided, we will begin accepting new applications.

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[54] *See, e.g.*, Dial-A-Page Comments at 2-3, Preferred Networks Comments at 1.

[55] *See Notice of Proposed Rule Making*, PR Docket No. 92-209, 7 FCC Rcd 6470 (1992); *Notice of Proposed Rule Making*, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992). Each of the coordinators would be required to notify the others of applications submitted for coordination, but mutual consent among the coordinators would not be required. Consistent with our current practice, priority of applications would continue to be based on the time of filing with the Commission, not filing with the coordinator.

[56] The Commission has broad discretion to freeze acceptance of new applications. *Kessler v. FCC*, 326 F.2d 673, 680-681 (D.C. Cir. 1963). The freeze applies to both the construction of new systems and the expansion of existing systems through new construction. In addition, the freeze covers applications for license modification as set forth in 47 CFR § 90.135(a), except that modifications relating solely to a change in station class, a change in station ownership or control, or a change in the number of paging receivers (47 CFR §§ 90.135(a)(6)-(8)) will continue to be allowed. Minor changes not requiring license modification will also be unaffected by the freeze. *See* 47 CFR § 90.135(b).

[57] The proposed thirty-day window is for procedural purposes only. Thus, existing licensees who fail to meet the deadline will not forfeit their right to exclusivity. We anticipate that the initial determination of which existing licensees are entitled to exclusivity will be carried out by the frequency coordinator. In addition, if there are existing licensees on the designated shared frequencies who would qualify for exclusivity under the new rules if they were on an exclusive frequency, we will also use this period to consider requests for reassignment to available exclusive frequencies.

IV. CONCLUSION

42. We believe that this proposed rule making will promote more effective PCP service by providing incentives for licensees to invest in the highest level of technology and to develop efficient, high-capacity paging systems on a local, regional, and national basis. At the same time, we recognize that the changes in the rules being proposed herein touch on a wide variety of conflicting interests and raise many complex issues. We encourage comments on these issues from all interested parties, and will carefully consider alternatives or modifications to these proposals that are consistent with the general objectives stated in this *Notice*.

V. PROCEDURAL MATTERS

A. *Ex Parte Rules* -- Non-restricted Proceeding.

43. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

B. Initial Regulatory Flexibility Analysis.

44. An Initial Regulatory Flexibility Analysis is contained in Appendix B to this *Notice*.

C. Comment Period.

45. Interested persons may file comments on or before **May 6, 1993** and reply comments on or before **May 21, 1993.** For filing requirements, *see generally* 47 C.F.R. §§ 1.415, 1.419. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. All comments will be available for public inspection during regular business hours in the Dockets Reference Room at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

D. Ordering Clause.

46. IT IS ORDERED that, pursuant to the provisions of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), no new applications for one-way paging licenses in the 929-930 MHz band will be accepted for filing by the Federal Communications Commission from February 18, 1993, through the conclusion of this proceeding.[58]

E. Further Information.

47. For further information regarding this *Notice*, contact David L. Furth, Private Radio Bureau, Policy and Planning Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[58] The imposition of this freeze on applications is procedural in nature. It is, therefore, not subject to the notice and comment and effective date requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 553(b)(A), 553(d); *Kessler v. FCC*, 326 F.2d 673, 680-681 (D.C. Cir. 1963). Pursuant to 5 U.S.C. § 553(d)(3), we further conclude that good cause exists to put this freeze into effect immediately because a delay in the effectiveness of the freeze could undermine the goals we intend to achieve thereby.

APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

2. 47 C.F.R. § 90.175(c) is amended to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(c) For frequencies in the 929-930 MHz band. A statement from the coordinator recommending the most appropriate frequency. For applications under Section 90.495, the coordinator's statement must verify that the proposed system meets the requirements of that section.

3. 47 C.F.R. § 90.494 is revised to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

(a) The following frequencies are available to all eligible Part 90 users for one-way paging systems on an exclusive basis as provided under Section 90.495:

929.0125	929.2875	929.4875	929.6625	929.8375
929.0625	929.3125	929.5125	929.6875	929.8625
929.1125	929.3625	929.5375	929.7125	929.8875
929.1375	929.3875	929.5625	929.7375	929.9125
929.1875	929.4125	929.5875	929.7625	929.9375
929.2125	929.4375	929.6125	929.7875	929.9625
929.2375	929.4625	929.6375	929.8125	929.9875

(b) The following frequencies are available to all eligible Part 90 users for one-way paging systems on a shared basis only and will not be assigned for the exclusive use of any licensee.

929.0375	929.0875	929.1625	929.2625	929.3375

(c) All frequencies listed in this section may be used to provide one-way paging communications to persons eligible for licensing under subpart B, C, D, or E of this part and representatives of Federal Government agencies.

The provisions of § 90.173(b) apply to all frequencies listed in this section.

(d) Licensees on these frequencies may utilize any type of paging operation desired (tone only, tone-voice, digital, tactile, optical readout, etc.).

(e) There shall be no minimum or maximum loading standards for these frequencies.

(f) The effective radiated power and antenna height for base stations providing one-way paging service in the frequency band 929-930 MHz must not exceed 1 kilowatt (30 dBw) and 304 meters (1000 feet) above average terrain (AAT), or the equivalent thereof determined from the following table:

Antenna height (AAT) [meters/(feet)]	Effective radiated power (ERP) (watts)
Above 1357 (4500)	65
Above 1205 to 1357 (4000 to 4500)	70
Above 1056 to 1205 (3500 to 4000)	75
Above 904 to 1056 (3000 to 3500)	100
Above 762 to 904 (2500 to 3000)	140
Above 609 to 762 (2000 to 2500)	200
Above 457 to 609 (1500 to 2000)	350
Above 304 to 457 (1000 to 1500)	600

4. Part 90, Subpart P is further amended by adding Sections 90.495 and 90.496 to read as follows:

§ 90.495 Channel exclusivity for local, regional, and national paging systems.

(a) Applicants for commercial or non-commercial private paging systems in the 929-930 MHz band are eligible for channel exclusivity based on the minimum separation standards provided in this section. To qualify for exclusivity, applicants must construct and operate a local, regional, or nationwide paging system that conforms to the following criteria:

(1) A local system must consist of at least six transmitters, except in the New York, Los Angeles, and Chicago MSAs, where [ ] transmitters are required. No transmitter may be counted as part of a local system for purposes of this section unless:

(i) it is located within 25 miles (40 kilometers) of at least one other transmitter in the system, and

(ii) it is not co-located with any other transmitter being counted as part of a local system for purposes of this section.

(2) A regional system must consist of 70 or more transmitters, located in no more than twelve adjacent states in the continental United States. In each of the top thirty markets listed in Section 90.741, no transmitter may be counted as part of a regional system under this paragraph unless it would also qualify as part of a local system under paragraph (a)(1) of this section.

(3) A nationwide system must consist of 300 or more transmitters in the continental United States and must provide service to:

(i) at least 50 markets;

(ii) 25 of the top 50 markets listed in Section 90.741; and

(iii) two markets in each of the following service regions:

(A) Region 1 -- Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont

(B) Region 2 -- Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, West Virginia

(C) Region 3 -- Illinois, Indiana, Ohio, Michigan, Wisconsin

(D) Region 4 -- Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee

(E) Region 5 -- Arkansas, Kansas, Missouri, Oklahoma, Texas

(F) Region 6 -- Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming

(G) Region 7 -- California, Nevada

(4) No transmitter may be counted as part of a local, regional, or nationwide system under this section unless it has a minimum output power of 100 watts, has simulcast capability, and is to be operated as part of the paging system for which channel exclusivity is sought.

(5) The provisions of this section apply solely to the frequencies listed in Section 90.494(a).

(b) If a paging licensee qualifies for exclusivity under paragraph (a) of this section, no co-channel authorization may be granted to another applicant except in compliance with the separation requirements set forth in this paragraph.

(1) The following table of heights and powers is used to classify all 929-930 MHz paging stations:

Average antenna height above average terrain [meters/(feet)]	Station class					
1206-1526 (4001-5000)	G	G	F	E	F	F
862-1205 (2826-4000)	H	G	G	F	F	F
610-861 (2001-2825)	K	H	H	G	F	F
427-609 (1401-2000)	L	K	H	G	G	G
304-426 (1001-1400)	L	L	K	H	G	G
177-303 (581-1000)	L	L	L	L	K	H
0-176 (0-580)	L	L	L	L	L	L
	125	250	500	1000	1860	3500

Effective radiated power (watts)

(2) The minimum distance between each co-channel station and each transmitter in a system qualified for local or regional exclusivity under paragraph (a) of this section is determined by the following table:

Station Class	Minimum separation between co-channel stations [kilometers/(miles)]				
L	112 (70)				
K	120 (75)	125 (78)			
H	128 (80)	133 (83)	138 (86)		
G	163 (101)	168 (104)	173 (107)	187 (116)	
F	223 (139)	227 (142)	233 (145)	247 (154)	275 (171)
	L	K	H	G	F

Station class

(3) No co-channel authorization will be granted in the continental United States on any frequency assigned to a nationwide paging system as defined in paragraph (a)(3) of this section.

(4) The separation standards set forth in this section do not apply to co-channel stations authorized prior to [effective date].

(c) A proposed paging system that meets the criteria for channel exclusivity under paragraph (a) of this section will be granted exclusivity under this section at the time of initial licensing. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date. If exclusivity expires for failure to construct a qualified system:

(1) the licensee may operate constructed stations, but such operation will be secondary to that of any licensee who qualifies for exclusivity under this section; and

(2) the licensee may not apply for any new station authorization in the previously proposed service area for one year from the expiration of exclusivity.

(d) Applications for channel exclusivity may request no more than one frequency in each location to be served. No applicant or affiliate of an applicant may apply for an additional frequency in an area that is the subject of the applicant's prior application unless the system proposed in the prior application has been constructed, is operating, and meets the criteria set forth in paragraph (a) of this section.

(e) Paging licensees may obtain channel exclusivity for stations authorized prior to [effective date] by showing that such stations constitute part of a paging system that meets the criteria set forth in paragraph (a) of this section.

§ 90.496 Extended implementation schedule.

A period of up to three years may be authorized for constructing and placing a paging system in operation if the proposed system qualifies for channel exclusivity under Section 90.495(a), is comprised of more than 30 transmitters, and the applicant submits justification for an extended implementation period.

(a) The justification must include reasons for requiring an extended construction period, the proposed construction schedule (with milestones), and a showing of financial ability to construct the system.

(b) If an extended construction schedule is authorized under this section, channel exclusivity under Section 90.495 will be extended for the duration of the construction period.

(c) Authorizations under this section are conditioned upon the licensee's compliance with the submitted extended implementation schedule. Failure to meet the schedule will result in loss of authorizations for facilities not constructed and loss of exclusivity as provided in Section 90.495(c).

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

The Commission proposes to amend Part 90 of its rules to provide channel exclusivity to qualified private carrier paging systems on certain channels in the 929-930 MHz band. This change will promote the efficient use of paging channels by encouraging investment in new paging technology and the development of more efficient paging systems providing local, regional, and nationwide service.

Legal Basis

The proposed action is authorized under Sections 4(1), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a) (1988).

Reporting, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict with These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

The proposal would not affect the status of existing paging systems, but would change the requirements for obtaining authorization to expand existing systems or construct new systems. Both large and small private carrier paging applicants would be required to submit additional information in the licensing process to demonstrate compliance with geographic separation standards. Approximately two to three hundred existing licensees and an unknown number of potential applicants could be affected by the proposal.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The *Notice* discusses a variety of alternatives, none of which would have significantly greater or lesser impact than the proposal presented.

IRFA Comments

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 45 of this *Notice*.

APPENDIX C

Parties Filing Comments On RM-7986 Petition For Rule Making

Comments

Dial-A-Page, Inc.

Dial Page, L.P.

Mobile Telecommunication Technologies Corp.

PacTel Paging

Paging Network, Inc.

Reply Comments

Association for Private Carrier Paging, NABER

Comtech, Inc.

Dial Page, L.P.

Metagram America, Inc.

Message Center Beepers, Inc./Beepage, Inc.

Mobile Telecommunications Technologies Corp.

Pactel Paging

PageMart, Inc.

Paging Network, Inc.

Late or Informal Comments

A.A. Beep

Beeper Communications

Citi Page Plus

Dannelly Communications

Fone Page, Inc.

Groome Enterprises

Harlow Communications

Hy-Tech Electronics

K-Comm

Ralph C. Messer

Roger L. Morgan

Peninsula Communications

Personal Page

Power Telecommunication

Preferred Networks, Inc.

Raserco, Inc.

Ray's Electronics, Inc.

Don Reinero

Rodney Shepardson

Sioux Valley Communications

South Central Communications

Tel-Air Communications, Inc.

Tele-Page

Telephone Equipment

Trans-Border Communications

Twin Cities Paging, Inc.

Valley Communications

Lanty H. Wylie, Jr.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-69

In the Matter of

Amendment of Section 73.202(b), RM-8106
Table of Allotments,
FM Broadcast Stations.
(San Carlos and Oracle, Arizona)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: March 8, 1993; Released: March 31, 1993

Comment Date: May 21, 1993
Reply Comment Date: June 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by Desert West Air Ranchers Corporation ("petitioner"), permittee of Station KOYF(FM), Channel 279A, San Carlos, Arizona, seeking the substitution of Channel 276C2 for Channel 279A and modification of its construction permit to specify operation on the higher powered channel. In order to accommodate the request in conformity with the minimum distance separation requirements of the Commission's Rules, petitioner also requests the substitution of Channel 279A for Channel 276A at Oracle, Arizona, and modification of the license for Station KLQB(FM), Channel 276A.[1]

2. We believe the public interest would be served by the proposal since it could enable Station KOYF(FM) to expand its coverage area. Channel 276C2 can be substituted for Channel 279A at the petitioner's authorized site, located 27.2 kilometers (16.9 miles) west of the community,[2] consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules. Additionally, Channel 279A can be substituted for Channel 276A at Oracle, Arizona, at the authorized site of Station KLQB(FM).[3] Since San Carlos and Oracle are located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government in the proposal.[4]

3. The petitioner's modification request at San Carlos is consistent with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we shall propose to modify the permit for Station KOYF(FM) without entertaining competing expressions of interest in the use of Channel 276C2 at that community, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, we shall direct an *Order to Show Cause* to the licensee of Station KLQB(FM) at Oracle, Arizona, as to why its license should not be modified to specify operation on Channel 279A in lieu of Channel 276A.

4. Whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its willingness to reimburse the licensee of Station KLQB(FM) for its reasonable costs associated with moving to Channel 279A.

5. In view of the above, the Commission believes it is appropriate to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
San Carlos, Arizona	279A	276C2
Oracle, Arizona	276A	279A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Golden State Broadcasting Corporation, licensee of Station KLQB(FM), Channel 276A, Oracle, Arizona, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 279A in lieu of Channel 276A.

7. Pursuant to Section 1.87 of the Commission's Rules, Golden State Broadcasting Corporation may, not later than May 21, 1993, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Golden State Broadcasting Corporation, to furnish additional information. If Golden State Broadcasting Corporation raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may

[1] Although petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402 (b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to correct this omission in its comments.

[2] Coordinates at the site specified in the construction permit issued for Station KOYF(FM) (File No. BPH-910516ML) are 33-23-13 and 110-44-25.

[3] Coordinates at the licensed site of Station KLQB(FM) are 32-37-07 and 110-47-20.

[4] Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Golden State Broadcasting Corporation will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KLQB(FM), as follows: Golden State Broadcasting Corporation, P.O. Box 26040, Tucson, Arizona 85726.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **May 21, 1993,** and reply comments on or before **June 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Desert West Air Ranchers Corporation

Attn.: Ted Tucker, President

P.O. Box 36717

Tucson, Arizona 85740

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-70

In the Matter of

Amendment of Section 73.202(b), RM-8168
Table of Allotments,
FM Broadcast Stations.
(Wellton, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: March 31, 1993

Comment Date: May 21, 1993
Reply Comment Date: June 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Farmworkers Communications, Inc. ("petitioner") requesting the allotment of FM Channel 283C2 to Wellton, Arizona, as that community's first local aural transmission service. Petitioner stated its willingness to apply for the channel, if allotted to Wellton, as requested.

2. A staff review of the proposal reveals that Channel 283C2 can be allotted to Wellton in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction.[1] However, as Wellton is located within 320 kilometers (199 miles) of the U.S.-Mexican border, the Commission must seek concurrence of the Mexican government in the proposal.

3. We believe the public interest would be served by proposing the allotment of Channel 283C2 to Wellton, Arizona, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Wellton, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Wellton, Arizona	--	283C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 21, 1993,** and reply comments on or before **June 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Anne Thomas Paxson, Esq.
Borsari & Paxson
2033 M Street, N.W.
Suite 630
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 283C2 at Wellton are 32-40-18 and 114-08-18. Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-71

In the Matter of

Amendment of Section 73.202(b), RM-8134
Table of Allotments,
FM Broadcast Stations.
(Wickenburg, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: March 31, 1993

Comment Date: May 21, 1993
Reply Comment Date: June 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Circle S Broadcasting Co. ("petitioner"), permittee of Station KFMA(FM), Channel 229A, Wickenburg, Arizona, seeking the substitution of Channel 231C3 for Channel 229A and modification of its authorization to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 231C3 if it is allotted to Wickenburg, Arizona, as requested.

2. Channel 231C3 can be substituted for Channel 229A at the petitioner's suggested site, located 18.6 kilometers (11.6 miles) southwest of the community,[1] consistent with the minimum distance separation requirements of the Commission's Rules.[2] Additionally, since Wickenburg is located within 320 kilometers (199 miles) of the Mexican border, the Commission must seek concurrence of the Mexican government in this proposal.[3]

3. Although the Wickenburg proposal complies with Section 73.207(b)(1) and (e) of the Commission's Rules, we question whether, at petitioner's specified site, the requirements of Section 73.315 could be met. While petitioner states that its proposal would comply with the Commission's Rules by using maximum Class C3 facilities (25 kW effective radiated power and an antenna HAAT of 100 meters) at its specified site, or its equivalent from a higher elevation, we question whether the proposal would provide a 70 dBu signal over the entire community, as required by Section 73.315(a). A terrain profile graph reveals that a terrain obstruction of approximately 870 meters (2,854 feet) above mean sea level ("AMSL") lies approximately 8.0 kilometers (5.0 miles) northeast of the specified site. The average terrain elevation at the petitioner's requested site is 723.8 meters AMSL. Assuming operation at maximum conventional Class C3 facilities, the antenna radiation center at the petitioner's requested site would be 823.8 meters AMSL. The ground level at the referenced site is 787.4 meters (2,582.7 feet) AMSL. Therefore, a hypothetical antenna with a radiation center 100 meters above average terrain at the petitioner's referenced site would not provide a 70 dBu signal over the entire community of Wickenburg. Rather, in order to provide the entire community with a 70 dBu signal which clears all major obstructions, petitioner would be required to employ a tower of at least 256.4 meters (841.0 feet) above ground level at its referenced site.

4. Based on our analysis of petitioner's proposal as presented, we have determined that a 70 dBu signal would not encompass Wickenburg from the specified site. Petitioner's supporting engineering exhibit submitted with its petition did not include specific showings to demonstrate its ability to provide a 3.16 mV/m contour over the entire principal community of Wickenburg. The Commission generally will not make an allotment absent a showing that a site is available which will clear any major intervening obstructions and provide the community with a minimum signal of 70 dBu. *See, e.g., Pinckneyville, Illinois*, 41 RR 2d 69, 71 (1977). Therefore, petitioner is requested to provide additional information in its comments to demonstrate its ability to comply with the requirements of Section 73.315 of the Commission's Rules. If the petitioner desires to pursue its specified site, it should also include evidence of FAA clearance for a tower of 256.4 meters (841.0 feet) to accommodate its proposal at that location. In the event the requested information is not provided the proposal may be denied.

5. We believe the public interest would be served by proposing the substitution of Channel 231C3 for Channel 229A at Wickenburg, Arizona, since it could provide the community with an expanded coverage area FM service. Therefore, we shall propose to modify the petitioner's authorization for Station KFMA(FM) (File No. BPH-911218MA) to specify operation on Channel 231C3 in lieu of Channel 229A. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 231C3 at Wickenburg, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

6. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Wickenburg, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Wickenburg, Arizona	229A, 287C1	231C3, 287C1

[1] Coordinates used for Channel 231C3 at Wickenburg are 33-51-31 and 112-53-04.

[2] The site restriction is required to avoid a short-spacing to the authorized sites of Station KMGN(FM), Channel 230C, Flagstaff, Arizona, at coordinates 34-58-08 and 111-30-28, and to Station KOOL-FM, Channel 233C, Phoenix, Arizona, at coordinates 33-20-02 and 112-03-42.

[3] Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **May 21, 1993,** and reply comments on or before **June 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Aaron P. Shainis, Esq.
Lee J. Peltzman, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-72

In the Matter of

Amendment of Section 73.202(b), RM-8154
Table of Allotments,
FM Broadcast Stations.
(Ridgecrest and Lenwood, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: March 31, 1993

Comment Date: May 21, 1993
Reply Comment Date: June 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by Roy William Mayhugh, tr/as KLOA Radio ("petitioner"), licensee of Station KLOA-FM, Channel 285A, Ridgecrest, California, seeking the substitution of Channel 285B1 for Channel 285A and modification of its license to specify operation on the higher powered channel. In order to accommodate the request in conformity with the minimum distance separation requirements of the Commission's Rules, petitioner also requests the substitution of Channel 283A for Channel 285A at Lenwood, California, and modification of the authorization for Station KIQQ-FM.[1] Petitioner states that he will apply for Channel 285B1 if it is allotted to Ridgecrest, as requested.

2. In support of the proposal, petitioner states that the requested substitution at Ridgecrest will remove a site restriction on its present operation and will enable Station KLOA FM to expand its coverage area. Additionally, petitioner avers that the Lenwood substitution would afford Station KIQQ-FM an opportunity to improve its facilities to 6 kilowatts. Petitioner's proposal includes a letter from Eneida Orchard, licensee of Station KIQQ-FM, consenting to the requested substitution proposal at Lenwood, provided it is reimbursed for the costs incurred in the frequency change.

3. Channel 285B1 can be substituted for Channel 285A at Ridgecrest at the petitioner's suggested site, located 4.5 kilometers (2.8 miles) east of the community.[2] Channel 283A can be substituted for Channel 285A at Lenwood at the authorized site for Station KIQQ-FM.[3] However, since Lenwood is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government in the proposal.

4. Since the petitioner's modification request conforms with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KLOA-FM at Ridgecrest and Station KIQQ-FM at Lenwood, California, as requested, without entertaining other expressions of interest.

5. Whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for the costs associated therewith. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). In this instance, petitioner failed to state his willingness to reimburse Station KIQQ-FM, Lenwood, California, for its reasonable expenditures associated with moving to proposed Channel 283A to accommodate petitioner's modification request for Station KLOA-FM at Ridgecrest. Therefore, petitioner is advised to state his intention regarding reimbursement to the licensee of Station KIQQ-FM in his comments herein.

6. An *Order to Show Cause* to Station KIQQ-FM at Lenwood is not required in view of its consent to the petitioner's modification request. However, we will serve Eneida Orchard with a copy of this *Notice*.

7. In view of the above, we consider it appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.207(b) of the Commission's Rules, with regard to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Ridgecrest, California	224B1, 285A	224B1, 285B1
Lenwood, California	245A, 285A, 297A	245A, 283A, 297A

8. IT IS ORDERED That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to Eneida Orchard, Radio Station KIQQ-FM, SVL Box 8500, Victorville, CA 92392.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix

[1] Although petitioner's request was signed, he failed to include an affidavit verifying that the statements contained in his petition are accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to correct this omission in his comments.

[2] Coordinates at the petitioner's suggested site for Channel 285B1 are 35-36-27 and 117-37-29.

[3] Coordinates at the authorized site for Station KIQQ-FM are 34-51-20 and 117-02-57. Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **May 21, 1993,** and reply comments on or before **June 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Roy William Mayhugh
KLOA Radio
731 N. Balsam Street
Ridgecrest, CA 93555

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1993

COMMENTS INVITED ON ALASKA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Alaska (Region 2).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 2 consists of the state of Alaska. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 30, 1993** and reply comments on or before **May 17, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-81 Alaska-Public Safety Region 2.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1993

COMMENTS INVITED ON PUERTO RICO PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Puerto Rico (Region 47).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 47 consists of the Commonwealth of Puerto Rico. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **April 30, 1993** and reply comments on or before **May 17, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-82 Puerto Rico-Public Safety Region 47.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WESTERN SUB-RSA LIMITED PARTNERSHIP — File No. 02660-CL-MP-92

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market No. 697, Kittitas, Washington

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1993; Released: March 31, 1993

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Interstate Mobilephone Company (Interstate) filed a petition on December 19, 1991, to deny an application filed by Western-Sub RSA Limited Partnership (Western) on November 4, 1991. Western seeks authority to modify its wireline cellular system for the Kittitas, Washington (Kittitas) Rural Service Area (RSA) by adding a new cell. For the reasons discussed below, we dismiss the Western application.

II. DISCUSSION

2. In its petition to deny, Interstate argues that the Western application proposes a contour extension that would illegally cover unserved area within Interstate's market, the Seattle, Washington (Seattle) Metropolitan Statistical Area (MSA). We agree. An unserved area is any area "where there is no [Cellular Geographic Service Area] CGSA." *See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6158, 6200 (1991) (*First Report and Order*). Furthermore, the Common Carrier Bureau has held that "applications seeking authority to serve . . . areas in MSAs that remain unserved after the expiration of the cellular licensee's fill-in period are premature." *In re Cellular Applications for Unserved Areas in MSAs/NECMAs*, 4 FCC Rcd 3636 (Com. Car. Bur. 1989), *appeal pending McElroy Electronics Corp., et al. v. F.C.C.*, Case No. 91-1545 (D.C. Cir. filed Nov. 15, 1991); *see also Minneapolis SMSA Limited Partnership*, 7 FCC Rcd 2548 (Com. Car. Bur. 1992). Moreover, it is prohibited for an application to propose a contour extension into an area where the five-year fill-in period has expired. Section 22.903(d)(1) of the Commission's Rules provides that:

> Service area boundaries may extend into adjacent MSAs or [Rural Service Areas] RSAs if such extensions are *de minimis*, are demonstrably unavoidable for technical reasons of sound engineering design, and do not extend into the CGSA of any other licensee's cellular system on the same frequency block (unless the other licensee consents to the extension) or into any adjacent MSA or RSA on a frequency block for which the five year fill-in period has expired.[1]

The wireline licensee in the Seattle MSA, Seattle SMSA Limited Partnership (Seattle SMSA), did not expand its CGSA to cover the entire Seattle MSA prior to the expiration, in 1988, of its five-year fill-in period. *First Report and Order* at 6259, Appendix E. The extension area proposed by Western covers part of the area that Seattle SMSA did not fill-in. Therefore, the Western application improperly proposes service into an unserved area, and we must dismiss it.

3. Nor can we adopt the argument Western advances in its opposition. Western contends that the *First Report and Order* does not apply to the instant case because it forbade only licensees whose five-year fill-in period had expired from applying for unserved areas. Because the *First Report and Order* does not mention applicants seeking *de minimis* extensions into unserved areas, Western reasons, they must be able to provide service to unserved areas. In support of its argument, Western cites a statement in the *First Report and Order* that: "*[d]e minimis* contour extensions outside the MSA are not considered CGSA extensions and thus are not applications for unserved areas." 6 FCC Rcd at 6192. However, this quotation merely states that *de minimis* extensions, *per se*, are not the same as unserved area applications, but it does not necessarily follow that *de minimis* extensions are allowed to cover unserved areas.

4. Indeed, the *First Report and Order* held that:

> After the five-year fill-in period expires, any licensee whose 39 dBu contour covers an extension area will have interference protection in the extension area, and this area will automatically become part of this licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the fill-in period.

6 FCC Rcd 6185, 6230. Granting Western's application would therefore frustrate the Commission's established procedures and timetables for applications for unserved areas. Accordingly, because the Western application would cover an unserved area in the adjacent MSA, we must reject Western's argument raised in its opposition. In view of the foregoing, we must dismiss Western's application.

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[1] *See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, Third Report and Order and Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 7183, 7194 (1992) (*Third Report and Order*).

III. ORDERING PARAGRAPHS

5. Accordingly, IT IS ORDERED THAT the petition to deny filed by Interstate Mobilphone Company, IS GRANTED.

6. IT IS FURTHER ORDERED THAT the application filed by Western Sub-RSA Limited Partnership, File No. 02660-CL-MP-92, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-342

In re Application of

PONTCHARTRAIN BROADCASTING COMPANY, INC. — File No. BPCT-870330KT

For a construction permit
for a new television station
Hammond, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: March 19, 1993; Released: March 31, 1993

By the Commission: Commissioner Marshall not participating.

1. We have under consideration the applications for review filed on June 26 and 29, 1992 by Pontchartrain Broadcasting, Inc. (PBC) and the Mass Media Bureau, appealing from the decision of the Review Board in this case, 7 FCC Rcd 1898 (1992). In that decision the Board affirmed a determination that PBC, the sole remaining applicant, is financially unqualified and is not entitled to cure that deficiency by amendment. The Board also affirmed PBC's disqualification for falsely certifying in its application that it was financially qualified. As these rulings were dispositive, the Board declined to review the ALJ's further conclusion that PBC has been controlled by an undisclosed principal and thus that its representations as to the identity of its principals were fraudulent.

2. PBC contends that the Board erred in affirming the ALJ's adverse resolution of the false certification issue. It urges us to vacate that holding and decide the financial qualification issue and the real-party-in-interest issue in its favor or else remand for the Board to rule on the exceptions to the ALJ's adverse resolution of those questions.[1] The Bureau agrees that the false certification issue and the real-party-in-interest issue should be decided in PBC's favor and also contends that the rejection of the curative financial amendment should be overruled.

3. In light of the conclusion that we draw below concerning PBC's financial qualifications, we do not find it necessary to review the Board's conclusions concerning the false certification issue or the ALJ's ruling on the real-party-in-interest issue.

4. It is undisputed that PBC did not have an assurance of funding sufficient to satisfy the Commission's standard of financial qualification when it filed its application, on March 30, 1987, and that it did not gain such assurance at any time prior to May 9, 1991, when it submitted its financial amendment. 7 FCC Rcd at 1904 ¶20; PBC Application for Review at n.2. PBC did not admit this in the first instance, though. On the contrary, one of its principals certified in its application that PBC was financially qualified.

5. In reliance on that representation of financial qualification, the Mass Media Bureau designated PBC's application for hearing along with a competing application filed by Louis E. Jenkins. Evidence relevant to the comparative issue was duly presented, and the ALJ issued an initial decision in November 1988, holding that PBC was comparatively superior. 3 FCC Rcd 6800. While exceptions were pending, Jenkins contended in a motion to enlarge that there were material doubts as to whether PBC was financially qualified and hence as to the veracity of its financial certification. PBC opposed the motion, but the Board subsequently added a financial issue and a false certification issue against it and remanded for a further evidentiary hearing. 4 FCC Rcd 5245 (1989).

6. Hearing sessions were held on the financial and false certification issues in November 1989, the record was closed as to those added issues later in that month, and proposed findings and conclusions as to those issues were filed in December 1989. In January 1990 the ALJ added the real-party-in-interest issue and scheduled another supplemental hearing. In November 1990, Jenkins withdrew his application pursuant to a settlement agreement with PBC. 6 FCC Rcd 5034 n.2.

7. On May 9, 1991, nearly 1 1/2 years after the close of the record regarding the financial issues, PBC asked for leave to amend the financial and technical aspects of its application. It proposed, in the tendered amendment, to use a different transmitter site and to obtain financing from a would-be investor who would lend money to PBC in exchange for shares of non-voting stock. Previously PBC had been proposing to rely on bank financing.

8. The ALJ rejected the financial amendment because he found that PBC had been financially unqualified when it filed its application and certified that it was financially qualified. In light of these circumstances he held that the motion for leave to amend was fatally deficient according to the principle of *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991), that "in the absence of a demonstration by the applicant that it had reasonable assurance of financing at the time of certification, subsequent petitions to amend financial proposals have been disallowed." 6 FCC Rcd at 5032 ¶48. The Board upheld the ALJ's ruling.

9. The Mass Media Bureau maintains in its application for review that whether the *Aspen* rule properly applies to cases where, as here, there are no competing applicants is a novel question of law that the lower decisions resolved incorrectly. It argues that to apply the rule here would thwart, rather than serve, the underlying purpose of expediting the commencement of new service. Acceptance of this amendment would expedite commencement of new service, according to the Bureau, because the record is devoid of evidence of intentional concealment and hence the issue of financial qualification, which would be moot if the amendment were accepted, is the only impediment to

[1] PBC mistakenly asserts that the false certification issue is the only issue that the Board reached. In fact, as noted, the Board also affirmed the ALJ's holding that good cause is lacking for acceptance of an amendment that PBC had tendered to cure the admitted deficiency of its financial proposal and hence that PBC is financially unqualified. *Id.* at 1902 ¶15, 1904 ¶20.

grant. The Bureau also observes that, inasmuch as PBC is now the only applicant involved in this case, acceptance of the amendment would not be prejudicial to another party. It therefore asserts that the principle to be followed here is to be found in *Las Americas Communications, Inc.*, 5 FCC Rcd 1634 (1990), which states that

> [w]here a post-designation amendment permits the immediate grant of a pending application, either by facilitating a settlement agreement or by curing a disqualifying defect in the only pending application, the Commission generally concludes that the equities favor accepting the amendment.

Id. at 1637 ¶25.

10. *Aspen* is controlling here, not *Las Americas*, notwithstanding the absence of competing applicants. Acceptance of PBC's financial amendment would not entirely relieve us of administrative burdens occasioned by this proceeding, as it would not moot all of the outstanding issues that would have to be resolved before we could find that granting PBC's application would serve the public interest. If we were to accept the amendment, we would still have to review the Board's resolution of the false certification and real-party-in-interest issues in light of the instant appeals, whereas rejection of the amendment obviates that task. Thus, acceptance of the amendment would entail more immediate administrative burden than rejection. We cannot tell, without undertaking that additional analysis, moreover, whether such action would facilitate the institution of a new broadcast service, as the answer to that question depends on the ultimate resolution of the other qualifications issues. In *Las Americas*, on the other hand, acceptance of the amendment reduced administrative burdens by obviating resolution of several hearing issues presented in applications for review. Another notable distinction between that case and this one is that the *Las Americas* amendment, unlike PBC's financial amendment, did not involve a deficiency in the amending applicant's proposal and was filed promptly after the execution of the settlement agreement that gave occasion for it.

11. Moreover, granting the requested relief under the circumstances of this case would ultimately disserve broader interests of administrative finality. To condone PBC's deplorable dilatoriness – failing to secure requisite assurance of financing in the first place, then stubbornly maintaining when challenged that its financial proposal was reliable, contrary to the fact, only to submit a new financial proposal long after the conclusion of the additional hearing made necessary by its intransigence – would be inconsistent with our policy of requiring applicants to stabilize their proposals at the beginning of comparative hearings in the interest of expediting their resolution. *Aspen, supra*, 6 FCC Rcd at 1603 ¶12. We therefore conclude that the ALJ ruled correctly in rejecting PBC's financial amendment and hence that its application was properly denied for failure to establish that it is financially qualified.

12. ACCORDINGLY, IT IS ORDERED that the application for review that the Mass Media Bureau filed on June 26, 1992 and the application for review that PBC filed on June 29, 1992 ARE DENIED and that the Review Board's denial of PBC's application IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Withdrawal and
Expunction of Documents Sent to
Richard A. White, Jr.

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1993; Released: March 31, 1993

By the Commission:

I. INTRODUCTION

1. The Engineer-In-Charge (EIC) at the Commission's Norfolk, Virginia, field office sent a letter, dated January 25, 1991, to Richard A. White, Jr. (White), licensee of amateur station KA3T. The letter stated that White may have operated his station in violation of Section 97.113(a) of the Commission's Rules, 47 C.F.R. § 97.113(a), in that his station had retransmitted to another amateur station a packet radio message that appeared to facilitate the business activity of an organization known as The Coalition to Stop U.S. Intervention in the Middle East (Coalition). Several letters were then exchanged between the EIC and White's attorney, John Joseph McVeigh (McVeigh). In the final letter of this exchange, the EIC, on June 18, 1991, advised McVeigh that no further action would be taken in the matter because it appeared that steps had been taken to assure that no packet message addressed to all amateur stations in the United States emanates from White's station without prior screening for compliance with the rules. McVeigh was further advised that, because of the corrective action taken, nothing in the record would be prejudicial to the licensee in any future regulatory proceeding. Further, the EIC stated that there would be no expunction from the record of the correspondence exchanged.

2. McVeigh, on behalf of his client, then filed a petition, dated July 17, 1991, seeking reconsideration of the EIC's action. By letter of August 21, 1991, the Chief, Field Operations Bureau dismissed the Petition for Reconsideration because such petitions lie only where a final action has been taken. On September 20, 1991, McVeigh filed an Application for Review of the dismissal. This action denies his Application for Review.

II. APPLICATION FOR REVIEW

3. In his Application for Review, McVeigh argues that the Bureau's refusal to withdraw and expunge the January 25th letter and the related correspondence is prejudicial procedural error. He believes that the EIC erred by stating that the matter was closed because corrective action had been taken. His position is that there was no condition present which needed correction. Further, he states that the dismissal letter itself raises the possibility of further action against White if a repeated violation is detected. Moreover, in such a hypothetical situation, McVeigh believes that the question would arise again concerning whether the prohibition against transmission of business messages was violated previously. McVeigh also argues that it is irrelevant, for purposes of reconsideration, whether there was a final action or not. He believes that his client is entitled to an untainted record free of any question concerning the operation of his station. For these reasons, he requests withdrawal and expunction of the subject records in this case. McVeigh's three arguments are discussed below.

III. DISCUSSION

Corrective action

4. In his January 25th letter, the EIC requested White to describe specifically the corrective action taken to prevent retransmission of messages that may violate the rule against business transmissions. In White's March 4th reply, he declined to do so, invoking his constitutional right not to testify against himself.[1] By letter of April 17, 1991, the EIC explained to White that what was wanted was an explanation of the circumstances surrounding the apparent violation. The EIC reiterated his request that White describe the action that he had taken or procedures that he had implemented at his amateur station so that messages that violate the amateur service rules would not be retransmitted when his station is operated under automatic control. In his reply of May 17, 1991, White stated, through his attorney, that he could not be compelled to provide the type of response solicited. He did state, however, that no packet message addressed "@USA"[2] emanates from his station without prior screening for compliance with our rules. Further, he stated that his statement was voluntary and was made because he wanted to resolve the matter once and for all.[3] Regardless of whether the statement is considered "corrective action" or not, the fact is that White gave assurance that no packet message addressed to all amateur stations in the United States emanates from his station without prior screening for compliance with the rules. At that juncture, the response was considered satisfactory and the matter was closed.

Future regulatory proceedings

5. The second argument centers around the statement in the August 21st dismissal letter[4] concerning possible enforcement action for a repeated violation. This argument is without merit for a variety of reasons. It was clearly stated in the June 18th letter[5] that nothing in the record would

[1] *See* letter of March 4, 1991, to the EIC, Norfolk.
[2] "@USA" apparently means that the message is addressed to all amateur stations in the United States.
[3] *See* letter of May 17, 1991, to EIC, Norfolk, at paragraph 13.
[4] *See* paragraph 2, *supra*.
[5] *See* paragraph 1, *supra*.

be prejudicial to White in any future regulatory proceeding. There is no reason for him to assume that the statement had any other meaning. Further, the argument is based upon the hypothesis that a prohibited communication might be retransmitted over White's station in the future. That scenario is unlikely in view of the licensee's assurance that there is prior screening before retransmission of all messages addressed "@USA" in order to achieve compliance with our rules. Moreover, assuming, *arguendo*, that White violates the rules in the future, it would not be considered a repeated violation because we did not determine that the original transmission of January 6, 1991, was a violation. In his June 18, 1991, letter, the EIC advised Mr. White that the earlier letter of January 25, 1991, did not conclude that he had violated the rules. We also emphasize that nothing in the correspondence would prejudice Mr. White in any future regulatory proceeding.

Untainted record

6. The request for the Commission to withdraw the original letter and to expunge it and all the related correspondence from the record is unwarranted. We do not consider a licensee's file contaminated merely by the presence therein of an exchange of correspondence between the Commission and the licensee. Certainly in this case, the exchange has been fruitful. It has been confirmed that White is a licensee who takes seriously the responsibility for station control. We also find that the subject correspondence taken as a whole does not conclude, as Mr. White appears to fear, that any communication by him has constituted a rule violation. Thus, no useful purpose would be served by expunging the January 25th letter and the related correspondence from the Commission's files.

IV. ORDERING CLAUSES

7. Pursuant to the authority contained in 47 U.S.C. § 154(i), IT IS ORDERED that the Application for Review filed by John Joseph McVeigh, on behalf of his client, Richard A. White, Jr. IS DENIED.

8. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

9. For further information concerning this Memorandum Opinion and Order contact Maurice J. DePont, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMDATA HOLDINGS CORPORATION
AND COMDATA NETWORK, INC.,
Complainants,

v. File No. E-93-22

AMERICAN TELEPHONE &
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: March 22, 1993; Released: March 31, 1993

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On March 18, 1993, Comdata Holdings Corporation and Comdata Network, Inc. (collectively, Comdata) filed an Agreed Motion to Withdraw Complaint with prejudice. In its Motion, Comdata states that it no longer wishes to pursue the complaint and that defendant, American Telephone and Telegraph Company (AT&T) had authorized Comdata to represent to the Commission that it agrees to the terms of the motion.

2. We conclude that the public interest would be served by granting Comdata's request.

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Agreed Motion to Withdraw Complaint with Prejudice filed on March 18, 1993 by Comdata IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt, Chief,
Formal Complaints, & Investigations
Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2051

Application for Review

MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: February 19, 1993; Released: March 10, 1993

By the Commission: Commissioner Barrett concurring in part and dissenting in part and issuing a statement.

I. INTRODUCTION

1. On May 18, 1992, Southwestern Bell Telephone Company (Southwestern) filed a petition (Southwestern Petition) with the U.S. Court of Appeals for the District of Columbia Circuit (Circuit Court) seeking review of an order we released earlier that month.[1] In the *Southwestern Mid-course Order,* we granted in part and denied in part a Southwestern request for review of a Common Carrier Bureau (Bureau) order which had rejected the above Southwestern transmittal and related filings.[2]

2. After the Southwestern Petition and supporting brief were filed, we asked the Circuit Court to remand the case to enable us to give further consideration to the *Southwestern Mid-course Order.* On October 30, 1992, the Circuit Court granted our request. Upon further consideration of that order, we "reaffirm its essential holding. However, we take this opportunity to clarify the reasoning underlying that decision.

II. BACKGROUND

3. On May 3, 1991, Southwestern filed the above Application for Review (Southwestern Application) of the *Bureau Order.* That order rejected Southwestern's earlier Transmittal 2051[3] and related filings through which Southwestern had sought not only to increase its access rates but also, and principally, to increase its price cap indexes that establish the upper limit on Southwestern's aggregate rate levels. Through these filings, Southwestern sought to exempt itself from the requirement of the *LEC Price Cap Order* that LECs not engage in any aggregate price increases in the period leading up to price cap regulation such that any rate increases occurring between July 1 and December 31, 1990, be offset by decreases.[4] Thus, the relief sought by Southwestern in Transmittal 2051 and related filings did not merely involve a proposed increase in Southwestern's access rates but also an increase in the initial price cap indexes previously selected by this Commission for the price cap regulation of Southwestern.

4. Southwestern raised a number of objections to the *Bureau Order.* Southwestern challenged the Bureau's decision to apply price cap regulation to Southwestern's mid-course filings and its conclusion that these filings should be rejected under that regulatory scheme. Southwestern further argued that, if the Bureau had properly applied rate of return regulation, acceptance of those filings would have been required.

5. Based upon our review of the Southwestern Application and the related filings, our *Southwestern Mid-course Order* generally affirmed the Bureau's rejection of Southwestern's request to increase its rates and price cap indexes. However, we did allow a $6.87 million technical correction to Southwestern's July 1, 1990, access rates and corresponding indexes.[5] In the instant Order, we clarify the *Southwestern Mid-course Order.*[6]

III. APPLICABLE STANDARD

A. Application of Price Cap Regulation

6. The Southwestern Application argued that the Bureau Order had incorrectly applied price cap regulation to Transmittal 2051, rejecting it for violation of the price cap rules. According to Southwestern, the Bureau should have

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[1] *Southwestern Bell Telephone Company v. FCC,* D.C. Cir. 92-1220 (*SWB v. FCC*). The petition challenged the Commission Order released May 6, 1992: Southwestern Bell Telephone Company, Transmittal No. 2051, Application for Review, 7 FCC Rcd 2906 (1992) (*Southwestern Mid-course Order*).

[2] Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, Transmittal No. 2051, 6 FCC Rcd 2089 (Com. Car. Bur. 1991) (*Bureau Order*).

[3] Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, Transmittal No. 2051 (filed Dec. 4, 1990) (Transmittal 2051). As filed, Transmittal 2051 had an effective date of January 18, 1991, which was after the effective date of price cap regulation.

[4] Second Report and Order, 5 FCC Rcd 6786, 6814-17 (paras. 230-231, 245-250) (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for recon. of ONA Part 69 Order pending, petitions for further recon. dismissed,* 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *petitions for recon. of ONA Part 69 Order pending, appeal docketed, D.C. PSC v. FCC,* No. 91-1279 (D.C. Cir. June 14, 1991). In the *LEC Price Cap Order,* this Commission designated each price cap LEC's aggregate July 1, 1990, rates as the starting point for price cap regulation. By inaugurating the Price Cap Index (PCI) and the Actual Price Index (API) on the same date, and deciding that the date should be six months before the effective date of these LECs' initial price cap tariffs, the Commission sought to assure that, within each basket of services, any rate increases in one service would have to be offset by rate reductions for other services. Thus, within each basket, each LEC's aggregate January 1, 1991, rate levels were kept at or below an initial price cap set for that LEC on the basis of its rates six months earlier. These decisions ensured that in the interim between the September 1990 adoption of LEC price cap regulation and its January 1991 implementation, LECs would not be able to drive up their 1991 price caps by increasing their 1990 rates. *LEC Price Cap Order,* 5 FCC Rcd at 6814-6817 (paras. 230-231, 245-250).

[5] *See Southwestern Mid-course Order,* 7 FCC Rcd at 2910 (paras. 25-28).

[6] We do not revisit each and every argument addressed in the *Southwestern Mid-course Order.*

examined the transmittal under rate of return rules, and permitted the transmittal to take effect. On review, the *Southwestern Mid-course Order* examined Southwestern's rate of return argument first, finding that even if rate of return rules had been applicable, Southwestern had not made the required showing. In this Order, we clarify that the fact that we addressed Southwestern's rate of return argument at length in our earlier Order should not be construed as a decision to modify or abandon the Bureau's rationale for rejecting Transmittal 2051. As discussed below, the Bureau correctly determined that the proposed revisions to Southwestern's rates and related price cap indexes would have violated the *LEC Price Cap Order* and our price cap rules.[7] Accordingly, we clarify that Southwestern Transmittal 2051 was correctly rejected as patently unlawful for failing to comply with applicable price cap requirements and we expressly affirm the Bureau's decision to reject the tariff filing.

7. The Commission released the *LEC Price Cap Order* on October 4, 1990, and the price cap rules became effective October 31, 1990.[8] On that date Southwestern and other large local exchange carriers became subject to mandatory price cap rules which set their price caps based on their July 1, 1990, aggregate rates adjusted for the change in the authorized rate of return which became effective on January 1, 1991. Those rules required Southwestern and the other price cap carriers to file their first price cap tariffs based on those July rates on November 1, 1990, with an effective date of January 1, 1991. Southwestern was subject to price cap regulation when it filed its initial price cap tariff on November 1, and continued to be subject to such regulation when, over a month later, on December 4, 1990, it filed Transmittal 2051, which it characterized as a mid-course filing, with an effective date of January 18, 1991. Accordingly, we confirm our earlier finding that the Bureau was correct in applying price cap rules to Transmittal 2051 and subsequent related filings.[9]

8. As noted in the *Southwestern Mid-course Order*, price cap regulation permits carriers to adjust their price cap indexes upward in two ways relevant here: through an above-cap filing and through an exogenous cost adjustment.[10] To allow Southwestern to implement price cap regulation with the rates Transmittal 2051 contemplated, we would have had to permit Southwestern to increase its aggregate rates above the price cap indexes we initiated at July 1, 1990, rate levels and the subsequent represcription. Such above-cap filings can be made by price cap carriers who contend they cannot achieve the productivity gains required by price cap regulation and, therefore, that their aggregate rates must be allowed to exceed the applicable price cap.[11] Section 61.49(e) of our Rules, 47 CFR § 61.49(e), provides that such above-cap filings must be accompanied, first, by an explanation of how all costs have been allocated among the carrier's baskets and, second, within the relevant basket, the carrier must make a cost assignment showing, including a detailed explanation of the reasons for the prices of all rate elements to which costs are not assigned. In Transmittal 2051, Southwestern neither explained the manner in which its costs had been allocated among its baskets nor provided the cost assignment showing required by this rule.[12] Indeed, Southwestern has conceded that it did not make a price cap showing required by our rules because it claimed rate of return regulation still applied. In view of these patent defects, the Bureau could not have permitted Transmittal 2051 to become effective as an above-cap filing under Section 61.49(e).

9. Alternatively, Transmittal 2051 could be regarded as an application for an exogenous cost adjustment. As indicated in the *Bureau Order*, unless Southwestern's projected revenue requirement changes qualified as a change in its exogenous costs, Southwestern's filing amounted to an unjustified above-cap filing.[13] Exogenous costs are one of three variables that determine how a given price cap index changes over time. Only a limited list of such costs are permitted to alter the price cap index. Section 61.45(d) of our rules, which lists these permissible exogenous cost adjustments, also includes cost changes caused by such other extraordinary exogenous cost changes as the Commission shall permit or require.[14] Thus, the *LEC Price Cap Order* and the Commission's rules leave open the possibil-

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[7] *See Bureau Order*, 6 FCC Rcd at 2090.

[8] *See LEC Price Cap Order*, 5 FCC Rcd at 6837-6838 (para. 413). *See also* Policy and Rules Concerning Rates for Dominant Carriers, 55 FR 42375 (Oct. 19, 1990). This notice in the Federal Register included a summary of the LEC price cap rules and a statement that they would become effective October 31, 1990. Subsequent corrections to these rules did not change that effective date. Erratum, 5 FCC Rcd 7664 (1990); 55 FR 50558 (Dec. 7, 1990).

[9] Our statement in the *Southwestern Mid-course Order* at paragraph 29 that Transmittal 2051 was filed while rate of return regulation still applied to Southwestern was correct in that the Southwestern rates in effect when that transmittal was filed were set with reference to rate of return regulation because Southwestern's initial price cap tariffs had not yet become effective. However, as we clarify in the instant Order, any Southwestern tariff revision, filed after the price cap rules became law on October 31, 1990, and bearing an effective date later than December 31, 1990, necessarily was subject to the price cap rules rather than rate of return regulation. Accordingly, after December 31, 1990, the extent to which the rates and other terms of such a tariff are just and reasonable could only be determined with reference to price cap regulation. *See LEC Price Cap Order* 5 FCC Rcd at 6836 (paras. 401-406).

[10] The *Southwestern Mid-course Order* listed a third way -- a price cap low end earnings adjustment. For a LEC that experiences unusually low earnings during a specified base period of price cap regulation, such an adjustment would be available so that the LEC could prospectively raise its PCIs and its related rates. Since the first price cap tariff year did not begin until 1991, this earnings adjustment would not be available to remedy any alleged SWB earnings shortfall until July 1992. *See* Section 61.45(d)(1)(vii) of our Rules, 47 CFR §61.45(d)(1)(vii); *LEC Price Cap Order*, 5 FCC Rcd at 6802 (para. 127). Since our rules precluded Southwestern from using this to increase its PCI in December 1990, we do not discuss it here.

[11] *See LEC Price Cap Order*, 5 FCC Rcd at 6823-24 (paras. 300-304).

[12] This detailed cost showing is intended to discourage price cap carriers from breaching their price cap indexes, unless those indexes would lead to confiscatory rates. Should a price cap carrier experience such low earnings over such a prolonged period of time that its opportunity to attract capital and its ability to provide service were seriously impaired, the low end adjustment mechanism would enable that carrier to raise its price cap indexes. However, as explained in note 10, *supra*, that mechanism was unavailable to Southwestern at the time it filed Transmittal 2051.

[13] *Bureau Order*, 6 FCC Rcd at 2092 n.9.

[14] *See* Section 61.45(d)(1)(vi) of the Commission's Rules, 47 CFR §61.45(d)(1)(vi). Southwestern does not raise any of the matters included in the list.

ity of adjusting the price cap index for exogenous costs not found on the list. However, in the *LEC Price Cap Order*, this Commission indicated that it would not permit any additional exogenous cost adjustments except in a "truly extraordinary situation" to avoid confiscatory rates.[15]

10. In Transmittal 2051, Southwestern did not seek an exogenous cost adjustment or otherwise attempt to justify such an exogenous adjustment by claiming that its then current rates were confiscatory because of some truly extraordinary situation. On the contrary, Southwestern asserted that it was making an ordinary mid-course correction similar to other mid-course corrections that it and other LECs had filed in the past under rate of return regulation. Thus, to the extent Transmittal 2051 is viewed as a request for an exogenous cost adjustment, it was properly rejected as patently unlawful under Section 61.45(d) and the *LEC Price Cap Order*.

11. We therefore reaffirm the findings in the *Southwestern Mid-course Order* that the Bureau properly applied price cap rather than rate of return standards to review Transmittal 2051. Furthermore, our review of applicable price cap rules indicates that, except for the $6.87 million technical correction described in that Order, Southwestern did not qualify under those rules for the requested changes in its July 1990 rates and related price cap indexes. Moreover, given the text of the *LEC Price Cap Order* and the timing of the Transmittal 2051 filing, we find Southwestern had adequate notice that this filing would be evaluated under price cap regulation. In view of the relief requested by Southwestern (*i.e.*, a change in Southwestern's July 1990 rates and related indexes) and Southwestern's failure to meet the substantive requirements of applicable Commission rules for such relief, the Bureau properly rejected Transmittal 2051 as patently unlawful under those rules.

B. Alternate Analysis Under Rate of Return Regulation

12. Since our decision to reject Transmittal 2051 is grounded in Southwestern's noncompliance with applicable price cap rules, the portions of the *Southwestern Mid-course Order* that respond to Southwestern's rate of return arguments represent an alternate ground to support our decision. We reaffirm our earlier conclusion that the Bureau properly applied price cap rather than rate of return regulation to Transmittal 2051 and clarify that the discussion of Southwestern's rate of return argument was included only to address Southwestern's repeated claim that had rate of return regulation been applied to Transmittal 2051, we would have been compelled to allow Southwestern to make all requested rate increases.

13. The *Southwestern Mid-course Order* identified several specific concerns the Commission had relating to LEC mid-course corrections made during the period between adoption of our price cap rules and the first price cap tariffs becoming effective. This Commission wanted to discourage such corrections from being used to secure unjustified rate increases during that period.[16] Accordingly, this Commission took several significant steps to limit opportunities for such unjustified aggregate rate increases. For example, the initial January 1, 1991, price cap indexes were calculated starting from LEC access rates in effect on July 1, 1990 -- a date prior to the adoption and release of the *LEC Price Cap Order*. In addition, this Commission required that each LEC's aggregate rates effective on January 1, 1991, be equal to or below its aggregate July 1, 1990 rates, adjusted for the change in the authorized rate of return which became effective on January 1, 1991. By capping each LEC's January 1, 1991, rates on the basis of its July 1990 rates, this Commission was able to assure that between July 1 and December 31, 1990, any rate increase for a particular service was offset by a rate decrease for a different service.

14. While attempting to guard against improperly increased rates prior to the start of price caps, this Commission had a competing concern that a carrier might, in a truly extraordinary situation, find its maximum permissible rates were confiscatory or that these rates would otherwise cause that carrier to only reach a level of earnings significantly below the authorized return for rate of return carriers.[17] Accordingly, if the July 1, 1990, rates subsequently proved to be unrealistically low, the *LEC Price Cap Order* left open the possibility that LECs could file mid-course corrections that would increase their July 1990 rates not only during the period prior to price cap tariffs becoming effective but also thereafter.

15. The *Supplemental Notice* was released by the Commission in March 1990[18] because the Commission recognized that it might receive mid-course corrections from LECs, like Southwestern, that claimed to be underearning in their final year of rate of return regulation. In its *Supplemental Notice*, the Commission proposed that such mid-course corrections be allowed to increase (or reduce) these LECs' July 1990 rates if such corrections became effective prior to the proposed price cap filing date and if these filings simply remedied under- (or over-) earnings situations encountered by these LECs. If a given LEC's mid-course correction met these requirements, the Commission proposed to treat the change in that LEC's July 1990 rates through a routine exogenous adjustment to that LEC's Price Cap Index.[19]

16. However, this Commission did not adopt that proposal, instead declaring in Footnote 315 to the *LEC Price Cap Order* that since it had just conducted a full review of access filings for rates effective July 1, 1991, any mid-course corrections during the six month period leading up to price cap regulation would likely be premature. The Commission stated that it would "not give any such corrections routine exogenous treatment."[20] This footnote made it much more difficult for LECs to justify mid-course corrections to their July 1990 rates and indicated that any such corrections would be carefully scrutinized. As we noted in the *Southwestern Mid-course Order*, this footnote did not guarantee that rates would in fact earn exactly the au-

[15] *See LEC Price Cap Order*, 5 FCC Rcd at 6810 (para. 190).

[16] *See Southwestern Mid-course Order*, 7 FCC Rcd at 2908 (paras. 16-17) *citing LEC Price Cap Order*, 5 FCC Rcd at 6814, 6816-17 (paras. 230-231, 245-250).

[17] *See LEC Price Cap Order*, 5 FCC Rcd at 6801-6802 (paras. 121, 127-128).

[18] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Supplemental Notice of Proposed Rulemaking, 5 FCC Rcd 2176 (1990) (*Supplemental Notice*).

[19] *See Supplemental Notice*, 5 FCC Rcd at 2281 (para. 228-229).

[20] *LEC Price Cap Order*, 5 FCC Rcd 6848 n.315.

thorized rate of return on the eve of price cap regulation, but rather established a general mechanism to ensure that carriers would not be unfairly handicapped as they enter price cap regulation.[21] Thus, we reaffirm our finding in the *Southwestern Mid-course Order* that, to the extent rate of return regulation applied, the *LEC Price Cap Order* requires review of LEC mid-course corrections under more stringent criteria than those traditionally prevailing under rate of return regulation,[22] and that the Southwestern filings would not have satisfied these criteria even if rate of return regulation had been applicable.

IV. CONCLUSION AND ORDERING CLAUSE

17. We have reexamined Southwestern's Application for Review, the associated oppositions, Southwestern's reply to those oppositions, as well as the related filings. As discussed above, we affirm, as clarified, the *Southwestern Mid-course Order*.

18. Accordingly, IT IS ORDERED, that the findings and conclusions set forth in this Commission's *Southwestern Mid-course Order* ARE HEREBY AFFIRMED, as clarified in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[21] *Southwestern Mid-course Order*, 7 FCC Rcd at 2908-09 (para. 19).

[22] We also clarify that the *Southwestern Mid-course Order* uses Southwestern's early retirement plan only as an example of the type of expense that must be examined in detail when such a higher standard is applicable. We did not then and do not now rely on the expenses of that plan to deny Southwestern any of the rate relief it seeks.

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT
DISSENTING IN PART

Re: In the Matter of Southwestern Bell Telephone Company's Mid-Course Order on Remand

Following the Commission's request that the Court remand this matter for further consideration, I assumed that the Commission would fully consider the points raised in my dissent in this matter. My assumption was incorrect. The Commission still fails to address the valid issues I pointed out in my dissent. While the opinion addresses many issues, it cannot justify the new standards adopted for Southwestern Bell's (SWB's) mid-course correction. As I previously stated,

> it appears that the Commission for the first time articulate[d] a new more stringent standard for these type filings. The Order notes that the Commission "implicitly" suggested review of mid-course corrections under more stringent criteria than those traditionally prevailing under rate of return. However, nowhere do I find that SWB was given explicit notice that it would be held to a more stringent standard when it filed its mid-course correction or afterwards. Nor can I find any articulation of the heightened standard to be applied. Instead, SWB received a waiver of Section 61.38(b)(1). Letter to SWB, from J. Cimko, Chief, Tariff Division, Common Carrier Bureau, FCC, dated Nov. 29, 1990. This waiver of the cost support data was granted subsequent to the Commission's release of the LEC Price Cap Order. Although the waiver did not, as the Commission's Order notes, constitute approval of the proposed filing, it may have provided SWB with an understanding that its mid-course correction would not be subjected to the heightened review standard the Commission now articulates in this Order.[1]

As I pointed out previously, my main concern was and still is with the Commission adopting a new more stringent standard without providing SWB with adequate notice. The Commission never made SWB fully aware of the new standards until after its mid-course correction was rejected. Indeed, it was provided an

[1] Statement of Commissioner Andrew C. Barrett Dissenting In Part, 7 FCC Rcd 2906, 2920 (1992) (footnotes omitted).

waiver of the cost support data before the new standards were implemented. I believe it important that the Commission speaks in a clear and consistent manner. It has not done so in this case. Accordingly, I must continue to dissent. Perhaps, the Court can convince the Commission to address this issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Optel Communications, Inc. File No. S-C-L-92-004

Application for a license to land and operate in the United States a submarine cable extending between Canada and the United States

CONDITIONAL CABLE LANDING LICENSE

Adopted: March 10, 1993; Released: April 1, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it the above-captioned application filed by Optel Communications, Inc. (Optel), on May 4, 1992, seeking authorization pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States" ("Cable Landing License Act"),[1] to land and operate a fiber optic submarine cable system (CANUS-1) extending between the United States and Canada. Optel proposes to operate CANUS-1 as a privately-owned system in which bulk capacity would be either leased or sold to users on a non-tariffed, non-common carrier basis. In this order, we grant Optel a conditional license to land and operate CANUS-1 in the United States.

II. APPLICATION

2. The applicant, Optel, is a corporation, organized under the laws of the State of Delaware, in which 80 percent of the ownership shares is owned by K. Schaefer & Associates and 20 percent by Teleglobe Canada, Inc. (Teleglobe). Teleglobe is the monopoly service carrier in Canada responsible for the provision of all international telecommunications services, originating or terminating in Canada, except for services between Canada and the United States. All of Optel's officers and directors are at present U.S. citizens; Teleglobe is expected to appoint a Canadian citizen as its director to Optel's three-member Board, constituting 33 percent of the Board. CANUS-1 will be owned jointly by Teleglobe and Optel. Teleglobe will own 100 percent of the cable station in Canada and 50 percent of the international portion of the submarine cable. Optel will own 100 percent of the cable station in the United States and 50 percent of the international portion of the submarine cable.[2]

3. Optel states that CANUS-1 will be based on the most advanced fiber optic technology available, employing at a minimum a total system capacity of 2.5 Gbit/s.[3] Optel proposes to land CANUS-1 in the United States at Manasquan, New Jersey, and in Canada at Pennant Point, Nova Scotia. The proposed cable will interconnect with both the U.S. and Canadian domestic long distance public switched networks (PSNs) and the transoceanic cables landing at Pennant Point, including the projected CANTAT-3.[4] The U.S. half of CANUS-1 will be operated under contract by Private Transatlantic Telecommunications Systems, Inc. (PSI), the current operator of the Private Transatlantic (PTAT) cable system.

4. Optel states that its proposed cable will provide additional voice, video and high speed data transmission capacity between the United States and Canada and via CANTAT-3 to Europe. Optel contends that traffic between Canada and the United States will grow at higher rates than normal due to the planned CANTAT-3 cable system as well as increased economic activities between the United States and Canada and the United States and Europe. CANUS-1 is designed to offer secure, high-quality, high-speed communications to a variety of users, such as private users, common carriers and government, on the basis of ownership, Indefeasible Rights of User (IRUs) or lease. Moreover, Optel notes that CANUS-1 will be the first undersea fiber optic cable connecting the United States and Canada and, therefore, asserts that CANUS-1 will enhance the restoration capabilities of existing terrestrial systems as well as improve the security of communications. Furthermore, Optel states that CANUS-1, in conjunction with CANTAT-3, will provide more effective restoration capability for TAT-10 than TAT-11 because it offers greater route diversity.

5. In addition to the public benefits of non-common carrier cable systems recognized by Commission policy,[5] Optel adds that CANUS-1 will also result in competitive prices, downward pressure on tariffs, and provide a secure, high quality digital link between the United States and Canada and via Canada to Europe without any risk to U.S. ratepayers or shareholders of common carriers. Finally, Optel argues that CANUS-1 is justified in terms of the additional capacity, redundancy and restoration it will provide for existing and planned facilities between the United States and Canada and between the United States and Europe.

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[1] 47 U.S.C. §§34-39.

[2] We retain jurisdiction to review all activities which take place within the cablehead facility.

[3] The exact transmission rate will be determined by the capacity requirements of the parties.

[4] CANTAT-3 is a fiber optic submarine cable system being constructed by Teleglobe, Telecom Denmark Ltd., Deutsche Bundespost Telekom, British Telecommunications plc and the General Directorate of Posts and Telecommunications of Iceland, and extending between Canada, Iceland, Denmark, Germany and the United Kingdom. It will have a design capacity of 60,480 simultaneous digital voice grade (64 Kbit/s) circuits. CANTAT-3 is expected to be ready for service in August 1994. CANTAT-3 will not only interconnect to CANUS-1, but also to the Pacific region as well as eastern and western Europe via terrestrial networks and cable systems.

[5] *See infra* n.8.

III. COMMENTS

6. The application was placed on public notice May 6, 1992. American Telephone & Telegraph Co. (AT&T) filed a Petition to Deny which MCI Telecommunications, Corp. (MCI), supported by letter dated July 28, 1992. Optel filed an Opposition to AT&T's Petition to which AT&T replied.[6] Subsequently, Optel filed a response. As detailed below, AT&T and MCI generally argue that this application should be denied until reciprocal opportunities exist in Canada for U.S. carriers to compete for intra-Canada and Canada-overseas traffic.

7. Pursuant to our obligations under 47 U.S.C. Sections 34-39 and Executive Order No. 10530, May 10, 1954, we informed the Department of State of Optel's application. The Department of State, in coordination with the National Telecommunications and Information Administration and the Defense Information Systems Agency, replied that it supports the grant of the license based on the specific facts of the application and subject to certain conditions.[7]

IV. DISCUSSION

A. Private Submarine Cable Policy

8. Optel requests a license to land and operate a private submarine cable system under the Commission's private submarine cable policy. In 1985, the Commission adopted this policy to promote competition in the provision of international transmission facilities.[8] The Commission has granted five cable landing licenses to land and operate private cable systems in the United States under this policy,[9] in each case authorizing the sale or lease of bulk capacity in the systems on a non-common carrier basis.

9. Consistent with precedent, we evaluate whether the Optel cable should be authorized to operate on a non-common carrier basis or should be classified as a common carrier system pursuant to the *NARUC I* standard, as applied in subsequent decisions authorizing non-common carrier satellite and cable facilities.[10] In the *NARUC I* decision, the court offered a two part test to determine when an operation should be classified as common carrier: "We must inquire, first, whether there will be any legal compulsion ... to serve [the public] indifferently, and if not, second, whether there are reasons, implicit in the nature of ... [the] operations to expect an indifferent holding out to the eligible user public."[11] In 1982, the Commission relied on the *NARUC I* test in its *Transponder Sales* decision to find that the sale or long-term lease of domestic satellite transponders by satellite owners does not constitute common carrier activity because the sellers of the transponders do not hold themselves out indifferently to serve the user public.[12]

10. In authorizing proposals to provide non-common carrier service via private submarine cables in both the North Atlantic and Pacific regions, the Commission and the Bureau found no distinction between the proposed operation of those facilities and the offerings that the Commission found to be non-common carrier activity in the *Transponder Sales* decision.[13] Applying these principles, we find that the CANUS-1 cable system would not be a common carrier operation and therefore need not be evaluated pursuant to Title II of the Communications Act of 1934.[14]

11. First, there does not appear to be a public interest reason to require that Optel's proposed cable facilities be provided on a common carrier basis. In applying the *NARUC I* test in its *Transponder Sales* decision, the Commission found that, due to wide scale availability of common carrier transponders, it did not need to compel the continued offering of all transponders on a common carrier basis. The Commission and Bureau subsequently found even less reason to require that proposed cables in the North Atlantic and Pacific regions be offered on a common carrier basis, given the wide availability of common carrier cables in those areas. We make the same findings here with respect to Optel's proposed cable system. Common carriers currently operate a mix of terrestrial, microwave and satellite facilities providing cross-border services between the United States and Canada. None of the persons filing comments in this proceeding suggest that the introduction of the CANUS-1 cable would create significant overcapacity so as to threaten the economic viability of existing com-

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[6] AT&T filed its Petition to Deny after the due date and, in its Reply, requested that we accept its late filing. Optel also requested that we accept its late-filed Opposition to AT&T's petition. We grant AT&T's and Optel's requests because Optel's application and AT&T's Petition raise issues which require full and complete consideration, and we find that the public interest would be served by accepting AT&T's petition, and the subsequent pleadings, into the record.

[7] Letter from Steven W. Lett, Acting Deputy United States Coordinator and Director, Bureau of International Communications and Policy, Department of State (dated December 16, 1992) to George S. Li, Chief, International Facilities Division, Common Carrier Bureau.

[8] *See Tel Optik Limited*, 100 FCC 2d 1033, 1041 (1985) (Private Cable Decision), in which the Commission concluded that the sale or lease of non-common carrier cable capacity on a non-tariffed basis would (1) permit the providers of capacity to make tailored and flexible arrangements with customers that are not possible under the regimen of a tariffed service offering; (2) enable customers to make long-term plans for the use of facilities with assurance as to facility availability and price; (3) permit systems to be specifically designed to customer needs; and (4) result in positive market developments for new and innovative service offerings.

[9] *See*, Private Cable Decision; Tel Optik, Ltd., I-S-C-L-84-002, -003, Mimeo 4618 (released May 17, 1985) (PTAT cable); Submarine Lightwave Cable Co., S-C-L-85-001, Mimeo 5241 (released June 19, 1985); Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (1987) (conditional license); 4 FCC Rcd 8061 (1989) (final license) (NPC cable); Transnational Telecom Ltd., 5 FCC Rcd 598 (1990) (ALOHA cable); and Transgulf Communications Ltd., Inc., 6 FCC Rcd 2335 (1991).

[10] *See* National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.) *cert. denied*, 425 U.S. 999 (1976) (" *NARUC I*")

[11] *Id.*

[12] *See* Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd* Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

[13] *See* Tel Optik, Ltd., I-S-C-L-84-002, -003, Mimeo 4618 (released May 17, 1985) (PTAT cable); Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (1987) (conditional license); 4 FCC Rcd 8061 (1989) (final license) (NPC cable) at n.9.

[14] We need not look beyond the Cable Landing License Act in examining applications for licenses to land and operate submarine cables for non-common carrier service. *See Private Cable Decision* at 1048.

mon carrier cable or satellite facilities. For our part, in view of the many common carrier facilities now available between the United States and Canada, we see no reason why the introduction of a non-common carrier facility would cause such harm. Thus, we find no public interest reason under *NARUC I* to require Optel's offering of capacity to be on a common carrier basis.[15]

12. Second, we agree with Optel that there is no reason to expect that the proposed CANUS-1 offerings will be made available to serve the public indifferently. The Commission and the Bureau found that the owners of the proposed PTAT and NPC cables, by selling or leasing bulk capacity tailored to the particular requirements of individual customers, would not be engaged in common carrier activity as they would not be holding themselves out indifferently to serve the user public. Optel will similarly lease or sell bulk capacity and "make individualized decisions, in particular cases, as to whether and on what terms to deal", and will not undertake "to carry for all people indifferently".[16] We therefore conclude that Optel's proposal to sell or lease bulk capacity in CANUS-1 is not likely to be made available to the public indifferently as a common carrier activity.[17]

B. Reciprocity

13. While there is no need to require that the proposed CANUS-1 cable be operated on a common carrier basis, we note that CANUS-1 differs from previously-authorized non-common carrier cable systems in that here (i) the monopoly owner (Teleglobe) at the foreign end of the cable also holds a minority ownership interest in the U.S. licensee at the U.S. end[18] and (ii) this system seeks to establish the foreign country at the other end of the cable as a transit point for U.S.-international traffic.

14. Generally, AT&T maintains that Teleglobe's status as the Canadian monopoly overseas service provider and Canada's routing restrictions foreclose parallel opportunities for U.S. carriers to enter the Canadian market to compete for Canadian traffic.[19] As a result, AT&T, supported by MCI, argues that Optel's application fails to satisfy the reciprocity standard of the Cable Landing License Act and, therefore, should be denied until certain conditions are met.

15. First, AT&T contends that Teleglobe's 20 percent ownership interest in Optel constitutes entry to the U.S. market and, thus, requires application of the reciprocity clause of the Cable Landing License Act.[20] AT&T then asserts that Teleglobe through Optel will be competing with U.S. common carriers for the U.S. and international traffic requirements of U.S. customers. By contrast, no U.S. carrier can compete with Teleglobe for the international traffic requirements of Canadian customers due to Teleglobe's monopoly on all Canada-overseas traffic. Optel responds that AT&T could take advantage of similar investment opportunities in Canada, and also notes that Teleglobe's minority investment should not raise reciprocity concerns, particularly in light of the non-common carrier status of CANUS-1.

16. Second, AT&T raises the concern that Teleglobe's monopoly status would give Teleglobe a unique ability and opportunity to leverage its Canadian home market monopoly to an unfair advantage in the competitive U.S. market in efforts to attract U.S. customers to its international facilities and services.[21] AT&T is further concerned that grant of this application would allow Teleglobe, a monopoly foreign carrier, to enter the U.S. market as a non-common carrier and, thus, allow it to compete free of regulation against regulated U.S. common carriers for the international traffic requirements of U.S. customers. In response, Optel asserts that AT&T's attempts to use the Cable Landing License Act as a device for opening up allegedly closed markets is disingenuous since AT&T has obtained cable landing licenses for cables terminating in countries dramatically more closed than Canada and has not argued that such licenses should be used as leverage for opening up those foreign markets.

17. Third, AT&T argues that Canada's routing restrictions requiring the "maximum use of Canadian facilities" preclude the use of U.S. facilities for the routing of either intra-Canada or Canada-overseas traffic.[22] Yet, argues AT&T, grant of this application would allow Teleglobe to enter the U.S. market, to compete for intra-U.S. and

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[15] We note, however, that we reserve the right to change CANUS-1's regulatory status to common carrier if, in the future, we find Optel in fact to be acting like a common carrier, or if we find that the public interest requires that Optel offer CANUS-1 capacity on a common carrier basis. *See, e.g.,* Norlight Reconsideration, 2 FCC Rcd 5167, 5168 (1987); *NARUC I,* 535 F.2d at 644.

[16] *Application* at 11.

[17] In its petition, AT&T argues that the proposed cable's interconnection to the U.S. and Canadian PSN is inconsistent with Optel's own characterization as a "private system". The Commission has never applied the restriction of non-interconnection to the PSN as a condition to "non-common carrier" status of private cables. *See Pacific Telecom Cable, Inc. Request for Clarification of Policies Concerning Use of Independent International Cables,* 4 FCC Rcd 4454, 4455 (1989) (*Clarification Order).* At present, we find no reason to depart from this approach in this context.

[18] Optel contends that the Commission has previously approved foreign minority ownership of a non-common carrier cable by a foreign monopoly carrier, referring to Cable & Wireless' ownership in NPC. We note, however, that C&W is not a monopoly carrier in Japan for either Japanese domestic or international traffic.

[19] Optel's response to this general reciprocity argument is that successful conclusion of operating and interconnection agreements by U.S. carriers with Canadian carriers is sufficient in itself to satisfy the general reciprocity clause of the Cable Landing License Act, particularly when applied to non-common carrier cable systems. We do not agree that the successful conclusion of such agreements is sufficient in this case to satisfy the reciprocity clause of the Act.

[20] *See* 47 U.S.C. §35 (a cable landing license "may" be denied on reciprocity grounds).

[21] AT&T Reply at 3.

[22] With regard to AT&T's arguments concerning evasion of the settlements process through use of CANUS-1, we note that use of CANUS-1 by end users does not implicate the international settlements process as these users are typically private line customers and private lines are not currently settled under the international settlements process. *See Regulation of International Accounting Rates,* CC Docket 90-337, Phase II First Report and Order (International Resale Order), 7 FCC Rcd. 559 (1992). We note that, to the extent that common carriers acquire capacity on CANUS-1 and carry IMTS traffic over those circuits, such traffic is subject to the settlements process.

U.S.-international traffic and to route such traffic over Canadian networks, while U.S. carriers would continue to be precluded from similar opportunities to compete for Canadian traffic over U.S. networks.

18. We turn first to AT&T's and MCI's argument that the Optel application represents the entry of Teleglobe, a Canadian carrier, into the U.S. market, which triggers a potential application of the reciprocity provision of the Cable Landing License Act. After reviewing the pleadings before us, we conclude that Teleglobe's partial ownership interest in Optel does not represent facilities-based entry into the U.S. market by Teleglobe and, thus, does not raise the issue of reciprocity.[23] Rather, we conclude that Optel, the proposed owner of the U.S.-end of CANUS-1, is a U.S. entity. Optel is a closely-held corporation, and 80 percent of its stock is held by U.S. citizens. Furthermore, all of the officers and two-thirds of the directors of Optel will be U.S. citizens. Neither Teleglobe's 20 percent minority shareholder interest, nor its ability to name one director, gives it control of Optel. As a result, we conclude that Optel is a U.S. corporation operating within the territory of the United States, and that licensing of CANUS-1 to Optel does not itself give rise to the kind of foreign presence that prompted Congress to enact the reciprocity provisions of the Cable Landing License Act.

19. In any event, in response to arguments that Teleglobe's investment in Optel could be seen as a form of entry in the United States, we note that the current Canadian legal and regulatory framework does not prohibit U.S. carriers from acquiring a 20 percent ownership interest, identical to the interest held by Teleglobe in Optel, in a Canadian licensee/carrier.[24] It accordingly appears that we have no basis in this record to conclude that a U.S. carrier would not be able to participate indirectly on the Canadian end in the same manner as Teleglobe does on the U.S. end of CANUS-1.[25]

20. We recognize, however, that were Teleglobe to increase its ownership or participation and acquire a controlling interest in Optel, this could result in a foreign monopoly carrier controlling both halves of a non-common carrier facility without appropriate Commission oversight. We are concerned that self-correspondence by any foreign monopoly carrier over a cable system landing in the foreign monopoly carrier's home market could lead to discriminatory practices. Such an increase in ownership would also raise a question whether U.S. carriers would continue to have similar rights in Canada, since Canadian telecommunications policy forbids U.S. carriers to increase their investments in Canadian carriers beyond 20 percent. To address this concern, we require as a condition of this license that Optel submit to this Commission for review and prior approval any proposed changes in ownership or participation of Teleglobe in Optel to determine whether such changes would result in the transfer of control from the U.S. owners to Teleglobe.[26] Moreover, we recognize the need to ensure that we will have the opportunity to review the full implications of Teleglobe's having an investment interest in and acquiring and operating capacity on both ends of this non-common carrier cable system.[27] Therefore, pursuant to the Cable Landing License Act, we prohibit Optel from selling or leasing any capacity in CANUS-1 to Teleglobe[28] unless and until Teleglobe has requested and received prior Commission approval for the sale or lease of any such capacity.[29]

21. We agree with AT&T and MCI that the Canadian regulatory policy requiring "maximum use of Canadian facilities"[30] discriminates against U.S. carriers to the extent that it would allow CANUS-1 to be used for the routing of intra-U.S. or U.S.-international traffic, but prohibit use of CANUS-1, or any U.S. common carrier facilities, for similar routing opportunities for intra-Canada or Canada-overseas telecommunications traffic.[31] Aside from our general

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[23] The Department of State's letter indicates that the foreign ownership component of Optel is consistent with the limitations it has previously imposed and that there is U.S. ownership and operation of the U.S. landing point. *See* Department of State Letter at n.7, *supra*.

[24] Neither AT&T nor MCI argue that a U.S. carrier would be unable to participate in the ownership of a Canadian carrier on the Canadian end of a submarine cable. We note, however, that Canadian policy would prohibit foreign investment in excess of 20 percent. *See* Department of Communications' "A Policy Framework for Telecommunications In Canada" (July 1987) (*Policy Framework*). Indeed, the statute that privatized Teleglobe specifically prohibits foreign ownership in Teleglobe to exceed 20 percent. *See* Teleglobe Canada Act (March 31, 1987).

[25] We have no evidence before us indicating that a U.S. common carrier has been denied a parallel opportunity to invest in a Canadian carrier. Indeed, we note that AT&T and Unitel Communications, Inc., a national facilities-based telecommunications carrier in Canada, announced on January 7, 1993, a proposed agreement which would result in AT&T acquiring a 20% equity share in Unitel and representation on its Board of Directors. *See* AT&T News Release, "Unitel Announces Proposed Agreement with AT&T", (released January 7, 1993).

[26] This condition, embodied in par. 28(8), is in addition to the standard conditions imposed in cable landing licenses regarding transfer of the license or rights granted herein or sale or transfer of a U.S. licensee's stock to a foreign entity (*see* conditions in par. 28(4) and (9)).

[27] Teleglobe's competitors might, for example, be concerned if Optel were to accord preferential treatment to its 20% owner, Teleglobe.

[28] In light of the combination of the non-common carrier status of this facility, Teleglobe's monopoly status in Canada, and Teleglobe's interest in Optel, we find it necessary to apply any requirements applicable to Teleglobe to Teleglobe's affiliates, as well as to partnerships and joint ventures in which Teleglobe is a participant. *See* Department of State Letter at n.7, *supra*.

[29] We also require that Optel file a copy of any contract, understanding or agreement entered into with Teleglobe for the sale or lease of any capacity on CANUS-1, or a summary of the arrangement providing the essential terms, conditions and rates. We require that any such contract, understanding or agreement, or summary, be filed simultaneously with any request by Teleglobe seeking Commission approval or authorization for the sale or lease of any capacity on CANUS-1 by Optel to Teleglobe. Any such contract, understanding or agreement, or summary, will be made available for public inspection.

[30] *See Policy Framework* at n.23, *supra*.

[31] Given that CANUS-1 lands in Nova Scotia, we agree with Optel that there is little likelihood that CANUS-1 would be used for intra-U.S. traffic. Although AT&T argues that the routing of traffic via Canada violates the CCITT Recommendations, any routing decisions will be made by the cable operator's customers, and not by Optel, which we note is also true for common carrier cable operators.

policy of encouraging use of direct routes,[32] we have additional concerns with the effect of these routing restrictions on the proposed use of CANUS-1 by common carriers. As both AT&T and MCI assert, the disparity of the respective regulatory frameworks could place U.S. carriers at a competitive disadvantage because they are precluded from using CANUS-1 for the intra-Canada or Canada-overseas traffic requirements of Canadian customers, when CANUS-1 may be used to compete for the routing of intra-U.S. and U.S.-international traffic through Canada.

22. We note that no U.S. common carrier has proposed to use or become an investor in the CANUS-1 cable. Indeed, the two largest U.S. international carriers have requested us to deny the CANUS-1 application. While we agree with AT&T and MCI that U.S. carriers should be protected against discriminatory practices, we do not believe that we need to grant the U.S. carriers' request to deny Optel's application. Rather, we recognize that Optel filed its application without U.S. carrier participation and Optel may wish to proceed with the cable solely on the basis of its projections of demand by end users for bulk capacity.[33] As a result, we grant Optel's application but wish to make clear to Optel that any investment it makes in CANUS-1 should not be based on the assumption that U.S. carriers will use the cable. We note, however, that U.S. carriers have the right in the future to file applications under Section 214 for authority to acquire bulk capacity for use in providing common carrier service.[34] We believe that any concerns as to the routing restrictions or other practices which may discriminate against U.S. carriers would be more appropriately presented and addressed in the context of individual carriers' Section 214 applications.[35] Should any carrier file such an application, the applicant must also simultaneously file a copy of the application with the Department of State.[36]

23. Finally, Optel argues that we should not impose special conditions on its proposed submarine cable facilities through the cable landing license, since terrestrial non-common carrier cable facilities are not subject to any such conditions. We note, however, that all submarine cables, whether common or non-common carrier systems, unlike terrestrial facilities, are subject to the specific statutory concerns of the Cable Landing License Act. While all submarine cable landing licenses contain certain standard conditions, we have previously imposed particular conditions on submarine cable landing licenses issued for non-common carrier cable systems due to the different nature of the owners of the cable system. We find nothing in Optel's application which warrants treatment different from that taken in previous non-common carrier authorizations. With regard to any conditions we may find necessary to impose through the Section 214 process, we note that such conditions would be applicable to each individual common carrier's authorization, not to the underlying facility.[37] Thus, we would not be imposing unique restrictions on the use of the facility, for example, by private users, to the extent that such use does not violate any general Commission policies.

C. Procurement

24. In the conditional license granted to NPC, we found that the presence of common foreign ownership on both ends of the non-common carrier cable system raised potential concerns as to the treatment of U.S. interests in the procurement process.[38] Optel's application raises similar concerns in light of Teleglobe's 100 percent ownership of the Canadian end of CANUS-1 and its 20 percent ownership of the U.S. licensee of CANUS-1.[39] We are concerned under the Cable Landing License Act that the interests of the United States would not be adequately protected if Optel were to be granted a final cable landing license at this time. We find that measures must be taken to assure

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[32] *See* In the Matter of Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes, 2 FCC Rcd 111 (1986) (CC Docket No. 85-204).

[33] Contrary to AT&T's assertion, we do not "demur" jurisdiction over common carriers acquiring capacity on any cable system, whether common carrier or non-common carrier. However, as the Commission stated in authorizing both the PTAT and NPC non-common carrier cable systems, the Commission's policy is that a non-common carrier system, such as CANUS-1, shall succeed or fail on its own merits and not through Commission action that would guarantee common carrier use of the system.

[34] We note that any common carrier wishing to acquire capacity in a non-common carrier cable must file an application under Section 214 whether one has already been licensed as a carrier or whether one wants to become one and whether a carrier is dominant or nondominant. We do not seek to place any special burdens on common carriers seeking Section 214 authorization to acquire and operate capacity on non-common carrier cables. Carriers are not required to demonstrate in their Section 214 applications that acquisition of non-common carrier cable capacity will not cause economic harm to common carrier operations. *See Clarification Order* 4 FCC Rcd at 4455. We note, however, that the Section 214 application process also affords the Commission an opportunity to consider the potential effect of traffic diversion from existing or planned common carrier facilities. During this process we may take any measures necessary to determine whether significant harm to facilities-based U.S. common carriers would occur and whether that harm would be antithetical to the public interest. We do not anticipate, however, that common carrier acquisition of capacity in non-common carrier cables would create such harm. Nonetheless, resolution of any issues of economic harm will be based on the particular facts of a Section 214 application then before us. *See Clarification Order*, 4 FCC Rcd at 4455-6.

[35] For example, if the record in the Section 214 application indicates that Canadian routing restrictions or other practices discriminate against U.S. common carriers, we may find it necessary to take steps to protect U.S. carriers in the Section 214 authorization process.

[36] *See* Department of State Letter at n.7., *supra* and Section 214(b). We also require that Optel inform any U.S. common carrier that seeks to acquire capacity from it for use in providing common carrier service of the carrier's obligation to file a Section 214 application and to file a copy of any such application with the Department of State.

[37] For example, in previous Section 214 authorizations for capacity on terrestrial facilities, we have imposed the restriction that the capacity may only be used for U.S.-Canada traffic. *See Cable and Wireless Communications, Inc.*, 6 FCC Rcd 236 (1991).

[38] *See* NPC decision, 2 FCC Rcd. 2686 (1987) (conditional license); 4 FCC Rcd. 8061 (1989) (final license).

[39] In addition, we are also concerned by the implications of the preferred supplier relationship between Northern Telecom and Bell Canada for the procurement of CANUS-1. As Bell Canada Enterprises (BCE), parent of Bell Canada, owns approximately 22 percent of Teleglobe and 51 percent of Northern Telecom, we believe that there may be an incentive to consider Northern Telecom more favorably in the procurement process.

that foreign interests are not favored over U.S. interests in the cable's planning, manufacture, installation, operation or maintenance. Therefore, we shall withhold final authorization until Optel successfully demonstrates that U.S. entities have been provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of CANUS-1. Although we will not establish specific guidelines for this requirement, we will review the progress of U.S. participation in the cable project.

D. Other Matters

25. Optel has provided the information required by Section 1.767 of the Commission's Rules, 47 C.F.R. Section 1.767, with the exception of the map indicating the cable landing points. However, Optel has stated that the proposed system will land at Manasquan, New Jersey and Pennant Point, Nova Scotia, Canada. We find this information sufficient to satisfy the requirements of Section 1.767.

26. Based on the information provided by Optel, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[40] Consequently, no environmental assessment is required to be submitted with this application under Section 1.1311 of the Commission's Rules.

27. Accordingly, in view of the above, we conclude that U.S. interests under the Cable Act can be assured through grant of this conditional license to Optel, subject to the conditions in this Order.

IV. ORDERING CLAUSES

28. Upon consideration of the application and in view of the foregoing, the Commission hereby GRANTS AND ISSUES, under the provisions of an Act entitled "An Act Relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39) to Optel Communications, Inc. a conditional license to land and operate a high capacity (2.5 Gbit/s) fiber optic digital transmission submarine cable, extending between Manasquan, New Jersey, United States and Pennant Point, Nova Scotia, Canada. This grant is subject to all rules and regulations of the Federal Communications Commission; any treaties or conventions relating to communications to which the United States is or may hereafter become a party; any action by the Commission or the Congress of the United States rescinding, changing, modifying or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensee or any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall not acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons controlling it or controlled by it are parties;

(4) Neither this license nor the rights granted herein shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Commission shall give prior consent in writing;

(5) The Licensee shall maintain no less than a 50 percent ownership interest and voting control share in the proposed cable, including 100 percent ownership in the cable station at Manasquan, New Jersey and in the U.S. land portion of the cable from the station to the U.S. beach joint of the submersible portion of the proposed cable;

(6) The Licensee shall not sell or lease any capacity on CANUS-1 to Teleglobe, its affiliates or any partnerships or joint ventures in which Teleglobe is a participant, unless and until Teleglobe, its affiliates, or partnerships or joint ventures in which Teleglobe is a participant has requested and received prior Commission approval for the sale or lease of any such capacity;

(7) The Licensee shall file a copy of any contract, understanding or agreement, or a summary containing the essential terms, conditions and rates, entered into with Teleglobe, its affiliates, or any partnerships or joint ventures in which Teleglobe is a participant for the sale or lease of any capacity on CANUS-1;

(8) The Licensee shall obtain prior Commission approval for any proposed increase in Teleglobe's level of ownership or participation in the Licensee;

(9) The Licensee shall, by application, obtain Commission approval prior to the sale or transfer to a foreign entity of five percent or more in the aggregate of U.S.-owned and -controlled Optel stock;

(10) This license is subject to future modification which may be determined necessary by the Secretary of State to protect U.S. interests as a result of: (a) the sale or lease of capacity to particular foreign or do-

[40] *See Application* at 5.

mestic entities; or (b) contracts awarded to particular foreign or domestic entities for the design construction, installation, operation or maintenance of the proposed cable;

(11) This license is revocable after due notice and opportunity for hearing by the Commission in the event of breach or non-fulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(12) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from such date, unless renewed or extended upon proper application duly filed no less than six months prior to the expiration date; and upon expiration of the license, all rights granted under it shall terminate; and

(13) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this conditional cable landing license.

29. IT IS FURTHER ORDERED that grant of a final cable landing license to Optel Communications, Inc. will be withheld until the Commission finds that Optel has demonstrated that U.S. entities have been provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable system.

30. This order is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-262

In the Matter of:

Implementation of Section 3 of the
Cable Television Consumer Protection
and Competition Act of 1992

Buy-Through Prohibition

REPORT AND ORDER

Adopted: March 11, 1993; Released: April 1, 1993

By the Commission: Commissioner Marshall not participating.

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I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act" or "the Act"] became law.[1] Section 3 of the Act, which amends Section 623 of the Communications Act of 1934, generally prohibits cable operators from requiring subscribers to purchase any "tier" of service, other than the basic service tier, "as a condition of access to video programming offered on a per channel or per program basis."[2] This is commonly referred to as the "buy-through" prohibition. In this *Report and Order* we adopt rules (see appendix B) to implement the statutory buy-through restrictions.

2. *Development of Channel Tiering.* "Tiering" of cable television programming services became commonplace in the late 1970s. Tiering involves the packaging and sale of channels of programming for separate or incremental charges. Cable systems that offer their services in tiers generally do so in a cumulative fashion, requiring subscribers to buy-through successive intermediate tiers of services in order to subscribe to each higher tiered service or to a service offered on a per channel or per program basis. Cable system operators generally control access to premium and pay-per-view services by using either addressable or non-addressable technology. Older systems generally use passive traps (frequency selective filters), nonaddressable converters, or nonaddressable converter/descramblers. These methodologies require the installation and removal of physical devices (traps or different converters) at the subscriber's premises in order to add or delete channels or groups of channels. Newer cable systems using addressable technology have the capability to communicate electronically from their headends to those subscribers who have addressable equipment, such as addressable traps or converters. Consequently, cable systems using addressable technology can make available different levels of cable services electronically, often instantaneously, from their headends. Many cable systems employ a hybrid of addressable and nonaddressable technology. Although addressable equipment permits system operators considerable flexibility in the service packages they market, the industry has generally not offered subscribers -- even those with addressable equipment -- the option of purchasing pay or pay-per-view services individually without the basic and intermediate service tiers.

3. *Statutory Requirements.* Section 3 of the 1992 Cable Act, adds a new Section 623(b)(8) to the Communications Act of 1934 which provides as follows:

(8) Buy-through of other tiers prohibited. --

> (A) Prohibition.-- A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[2] 47 U.S.C. §543(b)(8).

(B) Exception; limitation.-- The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after --

(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

(ii) 10 years after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, subject to subparagraph (C).

(C) Waiver.--If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

4. Briefly stated, "[t]he purpose of this provision is to increase options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programming."[3] "[G]reater unbundling of offerings leads to more subscriber choice and greater competition among program services. Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire."[4]

5. *Notice of Proposed Rule Making.* We issued the *Notice of Proposed Rule Making* in this proceeding on December 11, 1992, in order to adopt implementing rules and enforcement and waiver standards for the statutory buy-through prohibition.[5] In our *Notice* we sought comments on the current state of the cable industry's ability to comply with the Act, as well as on the technology and expense of various modifications necessary to achieve compliance. This information is particularly relevant to defining those cable systems whose "lack of addressable converter boxes or other technological limitations" do not permit them to offer programming on a per channel or per program basis in the manner that the statute seeks to achieve. We sought comment, too, on the scope of "other technological limitations" that would preclude compliance, and on how to treat systems that are capable of compliance only in part. We stated in the *Notice* our belief that, under the Act, cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are within the scope of the Act's 10-year exemption, and sought comment upon this interpretation. We also sought comment on the nature and scope of modifications of such systems that would allow cable operators to comply with the Act, with regard both to modifications to be made over a long period of time, and also modifications, if any, that are so simple or inexpensive that they can or should be required to be made in accordance with the provisions of the Act.

6. We also sought comment on how to define and determine the occurrence of prohibited "discriminat[ion] between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis,"[6] and on whether this provision allows pricing schemes such as multiple channel discounts. The *Notice* sought comment on the scope of our waiver authority under the Act, and the need for specific rules to prevent evasions of the buy-through prohibition. Finally, the *Notice* sought comment on how best to accomplish the Act's directive "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[7] when implementing the buy-through provisions.

7. In response to the *Notice*, the Commission received comments from twenty-three parties, and fourteen parties filed reply comments. A list of all commenters is contained in Appendix A.

II. BUY-THROUGH PROHIBITIONS

8. *Basic Statutory Requirement.* The fundamental requirement of the Act is that all systems permit "basic service tier" subscribers[8] to subscribe to video programming offered on a per channel[9] or per program basis without the necessity of subscribing to any intermediate tier of service, unless the systems' "lack of addressable converter boxes or other technological limitations" does not permit them to do so.[10] We stated in the *Notice* our belief that "cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are by defi-

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[3] 138 Cong. Rec. S14608-09 (Sept. 22, 1992) (statement of Senator Inouye).

[4] S. Rep. No. 102, 102d Cong., 2d Sess. 77 (1992).

[5] *Notice of Proposed Rule Making in MM Docket No. 92-262*, 7 FCC Rcd 8672 (1992).

[6] 47 U.S.C.§543(b)(8)(A).

[7] 47 U.S.C. §543(i).

[8] The "basic service tier" definition appearing in 47 U.S.C. § 623(b)(7) is the applicable definition for purposes of this proceeding. The term "basic cable service" set forth in 47 U.S.C. § 523(3); *see also American Civil Liberties Union v. FCC*, 823 F. 2d 1554 (D.C. 1987), is inapplicable in this context. For present purposes, each cable system is intended to have only a single basic service tier. We note that this issue was also raised in our *Notice of Proposed Rule Making in MM Docket No. 92-266*, 8 FCC Rcd 510, 514 (1992). On a separate matter, ENCORE Media and other parties suggest that the Act permits subscribers to purchase programming offered on a per channel or per program basis alone, without subscribing to the basic service tier. This also is a matter under review in *MM Docket No. 92-266. Id.* at 513-514, *supra*.

[9] Some "per channel" services, such as Home Box Office, are now being offered on a "multiplexed" basis. That is, the subscriber receives essentially the same programming repeated on several channels on a different time schedule. For rate regulation purposes, Congress has indicated that such multiplexed services are to be treated as if a single channel service were involved. H.R. Rep. No. 628, 102d Cong., 2d Sess. 80 (1992)("The Committee intends for these 'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand-alone purchase option.") We believe the same treatment is appropriate here.

[10] 47 U.S.C. §543(b)(8)(B).

nition within the scope of the Act's . . . exemption."[11] We noted, in this regard that the Senate Committee Report states that "only about one quarter of all cable systems are addressable, having the technology to isolate all channels."[12]

9. The State of New Jersey Office of Cable Television [New Jersey] notes that of 48 cable systems serving the state, 41 utilize addressability to varying extents and should be considered within the scope of the rule. However, other commenters are unanimous in their view that cable systems which are partially addressable are not capable of complying with the buy-through prohibition at this time without large capital expenditures. Nonaddressable trapping technology is still widely used throughout the industry, notes NCTA, and basic-only subscribers cannot be afforded unimpeded access to per channel or per program offerings due to the technological limitations of the traps currently in use, including signal degradation.[13] In addition, as Time Warner Entertainment Company, L.P. [Time Warner] notes, use of nonaddressable trapping technology as a means of accessing per channel or per program offerings is a highly labor- and cost-intensive method, requiring individual service calls, and potentially jeopardizing system security.

10. A major issue in Congress' consideration of the 1992 Cable Act was the cost that would be imposed on operators and subscribers as a consequence of the buy-through prohibition. Initially, there was an interest in providing the public with the additional programming options that this provision would make available as soon as possible. The response from the industry and others, however, was that the costs imposed by immediate compliance would be enormous, that subscription charges would be driven up, and that the natural evolution of cable technology would be frustrated. The compromise reached was to require that the "buy-through" option be made available except by "those systems that, due to technical limitations, could not comply...."[14] A full 10-year transition period was created for those systems unable to comply due to technical limitations. Both the history of Congressional consideration of this provision and the specific words of the statute suggest that it was fully addressable systems that were most specifically focused on as within the mandate for immediate compliance and that it was the costs of adding full addressability that were the principal reason for the 10-year transition.

11. The technological issues and definition of systems able to comply promptly with this requirement, however, appear to be more complicated than either the legislative discussion or our *Notice* in this proceeding anticipated. The Act mandates immediate compliance only by those systems that can do so without system rebuilding or reconfiguration -- that cannot comply "by reason of the lack of addressable converter boxes or other technological limitations" -- and that can do so without the imposition of large costs that would "require the cable operator to increase its rates." Assuming that subscribers selecting the buy-through option can be charged the specific customer premises equipment costs that they cause to be incurred, an issue discussed further below, there appear to be two kinds of operations to which the requirement may reasonably be applied.

12. First, systems that are addressable with respect to all nonbasic services have the capacity to shut off intermediate tiers and offer subscribers the basic service plus pay channel option without additional equipment expense.[15] Immediate compliance by these addressable systems is clearly anticipated.

13. Second, certain systems that control program access with traps have the ability to provide the buy-through option by adding, not adding or removing traps. Although a variety of complicating factors exist, two paradigm configurations illustrate these possibilities, as noted in footnote 13, *supra*. First, the buy-through option can be made available by installing positive traps if a scrambling carrier is used or by removing or not installing negative traps if the pay service to which subscription is sought is within the block of frequencies over which basic service is delivered. Thus, for example, if channels 2 through 13 encompass the basic service tier, all channels are distributed in an unscrambled mode, and a pay service is on channel 6, it is possible to deliver basic service plus the pay service by simply not installing or by removing the negative trap that would normally control access to channel 6. The second paradigm involves a system so configured that the intermediate tier or tiers of service are distributed over a single contiguously located block of channels that may be trapped out in bulk by band pass or band stop filters. Depending to some extent on the number of channels involved and the frequency spectrum they occupy within the cable system, it may be possible with a single block trap to remove the tier (or tiers) of service and so provide subscribers with the option of purchasing the channels that are not deleted by the trap.

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[11] *Id.* at 8673.

[12] S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992) at 77.

[13] A trap is an inexpensive filter designed to remove one or more signals (frequencies), generally located in or near a subscriber's home, used to control the delivery of cable services. The cable industry generally employs three kinds of traps: positive traps, negative traps, and band pass or band stop filters. Positive traps are designed to remove interfering (scrambling) signals inserted at the cable headend that secure the pay channel. Installing a positive trap enables the subscriber to view the channel. Negative traps are designed to remove the actual signals of one or more television channels. Removing the negative trap -- or not installing it -- enables the subscriber to view the channel. Thus, no scrambling signals need be inserted in the system. Band pass or band stop filters are designed either to pass a specific band of frequencies (signals) or block a specific band of frequencies (signals), thus controlling the delivery of a block of video channels to the subscriber. Traps can have a degrading effect on signal quality, limiting their use. *See Report and Order in MM Docket Nos. 91-169 and 85-38*, 7 FCC Rcd 2021, 2027 (1992), *clarified*, 7 FCC Rcd 8676, 8681 (1992).

[14] H.R. Rep. No. 862 ("Conference Report"), 102d Cong., 2d Sess. 64 (1992).

[15] The House Report, in another context, makes reference to systems whose "configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or other similarly simple method." H.R. Rep. No. 4850, 102d Cong., 2d Sess. 84 (1992) (discussing downgrading charges). Although this discussion did not involve the buy-through provision it does reflect congressional understanding regarding addressable system technology.

14. In order to accommodate these different situations, we will define systems subject to compliance during the 10-year transition period as all systems that:

> have the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service either: 1) by controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point or 2) through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.

15. This definition is, we believe, consistent with the statutory objective of providing consumers with the option of subscribing to basic and pay service without the need to subscribe to intervening service tiers where that can be done without incurring system expenditures that would increase rates and require premature system upgrading. We recognize that certain system configurations may allow the buy-through option to operate only with respect to certain individual pay or pay-per-view channels and that other channels, trapped or controlled in a different fashion, may be unavailable without intermediate tiers. In order to avoid disparity of treatment between the channels involved, we will not regard a system as capable of compliance and thus subject to the buy-through requirement unless access to *all* per channel and per program charge channels can be provided without intermediate tiers. Where access can be provided to some, but not all per channel or per program charge channels without intermediate service tiers, the cable operator may do so on a voluntary basis. Historical distribution patterns, which typically make such an offering easiest to provide for the most popular services, should not raise favoritism concerns. However, parties providing this option on a voluntary basis to less than the full complement of pay services are cautioned to offer the channels in a manner that is not anticompetitive or that evades the intent of the Act or regulations.

16. An additional issue regarding coverage of the buy-through provision concerns whether systems that are capable of compliance only with respect to portions of the geographical area they serve must comply with the requirement, *i.e.*, whether compliance is required after only 10 years or whether compliance to the extent possible is required now. In the *Notice* we sought comment on:

> the types of . . . cable system design which would present such technological limitations. For example, how should the buy-through provisions operate in instances in which only one community among several served by the same cable system has addressable capability, or in which various levels of services are offered to different communities or subscribers within a community?[16]

In response, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties [collectively, the Local Governments] urge that hybrid cable systems be required immediately to comply with the prohibition to the extent that such systems can. Other commenters state that such systems should be exempt from compliance.

17. There are likely to be systems that are addressable only in part of the area they serve, either within a franchise area or in some, but not all, of the franchise areas of a technically integrated system. This may result, for example, from a staged reconstruction of portions of a system, the integration of two or more previously separate systems, or because of different technical configurations that relate to franchise requirements. With respect to such operations we see no reason why compliance should not be required as the necessary equipment is put in place and other services are offered using it. Although some commenting parties have suggested that a resulting differential rate structure within a single geographic or franchise area might conflict with provisions of the Act regarding rate uniformity,[17] we believe there is sufficient flexibility in the Act to accommodate compliance with the buy-through requirement.

18. The Act's technological limitations exception to the prohibition ceases to apply after ten years[18] or once the technology utilized by the cable operator's system is improved in a way that eliminates the technological limitation.[19] We sought comment in the *Notice* on the nature and scope of modification of such systems which would allow cable operators to comply with the Act's buy-through provisions, particularly modifications made over a period of time. New Jersey and the Local Governments urge that the prohibition should apply at the time of renewal of a franchise or when a new community unit is constructed. Indeed, the Local Governments maintain that any upgrade should trigger a responsibility to fully upgrade in a manner sufficient to comply with the buy-through requirement. However, Viacom and the Massachusetts Cable Television Commission [Massachusetts] urge that newly-constructed cable systems not be burdened with an immediate compliance requirement.

19. The statute is clear that the buy-through requirement becomes applicable, even within the 10-year period, as systems become capable of compliance. We agree, therefore, with those commenters urging compliance as soon as systems have the necessary technical capacity. However, we find no requirement in the Act forcing upgrades prior to the expiration of the 10-year period chosen by Congress as

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[16] *Id.* at 8673.

[17] Section 623(h) (47 U.S.C. § 543(h)) provides: "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." Rules to implement this requirement are under consideration in *MM Docket No. 92-266, supra.* In that proceeding we expressed our tentative conclusion "that the statutory requirement of a geographically uniform rate structure does not prohibit establishment of reasonable categories of service with separate rates and terms and conditions of service." *Id.* at 534. We believe that the technological feasibility of complying with the buy through prohibition is such a reasonable category of service.

[18] 47 U.S.C. §543(b)(8)(B)(ii).

[19] 47 U.S.C. §543(b)(8)(B)(i).

the exception's duration. This compliance period was specifically enacted to protect cable operators and their subscribers generally against burdensome costs of compliance.[20] Accordingly, we continue to believe that cable systems not designed and built with (or upgraded to incorporate) addressable or other adequate technology, including systems constructed within this 10-year period, are covered by the Act's exemption. The 10-year transition period was apparently adopted at least in part to permit the "natural evolution" of technology. Present addressable systems, for example, typically incorporate encryption systems that frustrate the functioning of certain features of home electronic equipment and Congress has directed the Commission to address these equipment problems in Section 17 of the 1992 Cable Act.[21] Forcing the premature upgrading of equipment could interfere with accomplishment of the tasks set forth in Section 17. In addition, applying the requirement in a fashion that converted a nominal upgrade or rebuild into a conversion to full addressability would create a highly undesirable incentive to forgo system improvements.

20. We do not intend through our approach to freeze in place the manner of system operation or the way in which systems are designed or their channels configured. The need to comply with the regulatory policies incorporated in the 1992 Cable Act, including the mandatory signal carriage rules, the rate regulation provisions, and the equipment compatibility requirements, along with the benefits associated with the development of new programming services and potential technological developments, make it highly desirable that systems retain the flexibility to alter their channel configurations and signal access control mechanisms. Thus, we do not intend to mandate the continued use of any particular mode of operation. Indeed, systems are encouraged to continue to experiment and to improve service offerings to assure that they are "consumer friendly." In this regard, we are cognizant of situations where system operators have attempted to use technologies in the past, such as so-called pole line converters or signal interdiction taps, that might have facilitated the buy-through option but which were abandoned when rejected by consumers or found to be technically unsuitable.[22] Thus, while systems that have the capacity to do so must comply with the buy-through requirements, changes made to improve customer service or comply with other regulatory mandates are neither precluded nor discouraged.

21. *Discrimination Between Subscribers.* In addition to the basic buy-through provisions, Section 3 of the 1992 Act prohibits cable operators from "discriminat[ing] between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis."[23] This provision precludes through the indirect means of pricing what the basic buy-through provision prohibits directly. In our *Notice*, we stated our understanding of this provision as ensuring "that basic tier subscribers who do 'buy-through' are entitled to the same rate structure for those premium or pay-per-view services as subscribers purchasing intermediate services or tiers."[24] Virtually all commenters agree with our interpretation. However, the National Cable Television Association [NCTA] asserts that different rates may not be discriminatory if they are based on differences in costs of transmission. We disagree. The Act bans discrimination specifically based upon actual rates charged, thus precluding basic service tier subscribers from being charged higher rates than intermediate tier subscribers based upon claims of economies of scale.

22. We further sought comment in the *Notice* concerning which discounts and pricing schemes could be permissible under the Act's discrimination ban. Again, virtually all commenters propose a straightforward response with which we are in agreement: that is, discounts and similar pricing differentials are permissible so long as a basic-only subscriber may take advantage of such pricing schemes. So-called "multi-pay" discounts that do not distinguish between basic and upper tier subscribers are permissible. Viacom International, Inc. [Viacom] notes, and we agree, that certain discounts or special pricing offers may be afforded to nonsubscribers as initial inducements to become cable subscribers. Such pricing differentials are not prohibited by the Act.[25] We disagree, however, with Tele-Communications, Inc. [TCI], which would generally permit discounts and incentives as long as they were found to be "noncoercive." Using pricing which is found to be coercive as the standard for triggering the Act's buy-through prohibitions would embroil the Commission in subjective determinations of coercive behavior on a case-by-case basis. We believe this is not what Congress intended. Rather, Congress adopted an easily applied standard using rates to determine if basic-only subscribers are being discriminated against. We also disagree with Cole, Raywid & Braverman [CRB], which would permit systems to offer greater installation discounts to subscribers who take more than basic service under the notion that this would allow systems greater cost recovery, while not penalizing a basic-only customer. Rather, CRB argues, such discounts reward customers who take many products. The Act, however, is clear that subscribers that do not take intermediate tiers of service are entitled to the same pay or pay-per-view rates as parties who purchase intermediate tiers. Allowing discounts

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[20] *See* 138 Cong. Rec. S14608 (daily ed. Sept. 22, 1992) (remarks of Sen. Inouye).

[21] *See e.g. Notice of Inquiry in ET Docket 93-7*, para. 9 (released January 29, 1993) ("As a result of cable systems' use of these techniques, the manner in which cable service is delivered to subscribers often frustrates the use of special features that make use of multiple program signals. This tends to occur most often where some or all of the cable signals are scrambled or otherwise encrypted and the cable system provides service through a cable terminal device, or 'cable converter', that provides a single channel of programming to the consumer's equipment." (footnote omitted))

[22] The situation, however, is far from static. We note, for example, recent reports that Cablevision Systems Corp. has purchased $6.5 million of addressable interdiction equipment from Scientific Atlanta for deployment in 40 of its cable systems. *Multichannel News*, Feb. 8, 1993 at p. 2. On the other hand sales of addressable converters by their manufacturer were reported to be off 9 percent between 1991 and 1992 following an 8 percent decline the year before. *Multichannel News*, Feb. 15, 1993, at p. 33.

[23] 47 U.S.C. §543(b)(8)(A).

[24] *Notice* at 8673.

[25] However, such inducements must be reasonable in length so as not to be considered discriminatory.

based on the number of intermediate tiers taken directly contradicts this requirement, and accordingly is not permitted.

23. Those commenters who addressed the issue of whether or not a cable operator may charge basic only subscribers availing themselves of the buy-through option for the converter necessary to enable them to purchase per channel or per program offerings are unanimous in their belief that operators should be permitted to do so. We agree. To prohibit such charges would be discriminatory to subscribers who exercise their choice to obtain only basic service, since their rates would increase if the costs of addressable converters were shared by all subscribers to the systems. Allowing a pass-through of specific equipment costs to the subscriber requesting the service for which the equipment is needed is consistent with the generally accepted proposition that a party causing an expense to be incurred should bear that cost and that allocating costs in this fashion is not discriminatory.[26] We also agree with InterMedia Partners [InterMedia] that operators need not provide all subscribers with the exact same equipment, so long as they comply with the buy-through prohibition. Indeed, where addressable converters are necessary to exercise the buy-through option these converters need only be provided to those subscribers who request the service that necessitates their use. This, too, is the view of those commenters who address this issue. We see no reason to require subscribers to obtain unnecessary equipment that they do not want.[27]

24. *Waiver of the Buy-Through Prohibition.* The Act provides the Commission with the authority to grant waivers of the buy-through prohibition to the extent consistent with the public interest, if enforcement would cause a cable operator to increase its rates.[28] It also already includes a general waiver or exception to the prohibition for systems that lack the technical capability to comply, obviating the need for individual waivers in such cases during the first ten years after enactment. We sought comments, therefore, on whether or not there would be other circumstances in which a waiver would be necessary and appropriate, either during the Act's initial 10-year period or in the context of requests for extensions of the 10-year period.[29] We also suggested that commenters address whether or not Congress contemplated some minimum effect on rates, under which a waiver would not be appropriate.[30] We sought comment on what regulations or guidelines, if any, we should promulgate at this time for evaluating such waiver requests.[31]

25. Those commenters addressing the question of whether circumstances exist, other than those that impact costs, which warrant waivers, either during or after the 10-year exemption period, focus their comments essentially on cable system size.[32] The Coalition of Small Cable Operators [the Coalition] urges an automatic waiver for any system with fewer than 1000 subscribers at the end of the ten-year exemption. The National Cable Television Cooperative, Inc. [NCTC] suggests a below-5000 subscriber waiver. The Consortium of Small Cable Systems Operators [the Consortium] suggests a below-10,000 subscriber waiver, or -- utilizing a Small Business Administration definition -- a waiver for systems whose annual gross revenues are $7.5 million or under. Massachusetts, however, suggests that it is premature to set other waiver criteria without full and careful reflection. NCTA states that the Commission's waiver authority should be used on a case-by-case basis, as the need arises.

26. That portion of the Act concerning our waiver authority speaks broadly of the need for the Commission to exercise its public interest responsibilities, in the face of a request from any cable operator.[33] Waiver requests relating to two time frames are involved. First, at the end of 10 years, the general exemption expires, raising the possibility of requests from operators for extensions of the compliance date. While parties will need to be making decisions during the 10-year period relating to system construction, we nevertheless agree with those who suggest that it would be premature, at this time, to attempt to establish waiver standards to address extension requests. The pace of technical change in the cable industry suggests to us that any waiver guidelines promulgated at this time would almost surely be obsolete before the end of the 10-year transition period. For example, the current generation of addressable descramblers are, according to commenting parties, entirely incompatible with digital transmissions so that implementation of signal compression with its associated channel capacity expansion will require a new generation of equipment. Second, with respect to waiver requests involving compliance during the 10-year period, no commenter addressed the question of whether Congress contemplated a threshold effect on rates to warrant grant of a waiver pursuant to subsection (b)(8)(C). Thus, while rate effects are clearly an issue warranting consideration in the waiver process, we are in agreement with those parties suggesting that such requests be addressed on a case-by-case basis where the variety of factors specific to an individual situation may be weighed "to the extent consistent with the public interest. . . ."[34]

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[26] In accordance with the nondiscrimination requirements, however, the charge should not be more than the charge levied on subscribers to other service tiers. Thus, for example, if the converter fee were normally incorporated in the monthly charge for an expanded tier of service the charge to the party skipping that tier should not be larger. System operators should be prepared to demonstrate that this is in fact the case.

[27] We note that addressable converters interfere with or defeat many of the specialized features on subscriber's television sets or VCRs (*e.g.*, remote control, picture-in-picture, or recording one program while trying to watch another simultaneously).

[28] 47 U.S.C. §543(b)(8)(C).

[29] *Notice* at 8674.

[30] *Id.* at 8673.

[31] *Id.* at 8674.

[32] Prime Cable has suggested in its comments an additional ground for exemption, namely, that the Act's buy-through provisions apply solely in a rate regulated environment. We disagree. Prime argues that such a result is mandated because the buy-through provisions are embedded in that section of the Act addressing rate regulation. Contrary to Prime's contention, Section 643's provisions do not solely apply in the rate regulated environment. The legislative history is clear that the Act's buy-through provisions speak to giving subscribers in general the right to purchase, where possible, only those channels they wish to view. *See* 138 Cong. Rec. S14608-09 (Sept. 22, 1992) and S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992) at 77.

[33] 47 U.S.C. §543(b)(8)(C).

[34] 47 U.S.C. §543(b)(8)(C).

27. We also referenced in our *Notice* that §623(i) of the Act requires that our regulations be designed in such a way as "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[35] We thus sought comment on how best to accomplish this directive. The Coalition, the Consortium, and NCTA suggest that this can best be accomplished by establishing a blanket waiver or exemption from the buy-through prohibition for operators of small systems. Indeed, as noted above, the Consortium would create a complete exemption for systems of up to 10,000 subscribers, while NCTC suggests a 5000-subscriber threshold.

28. To the extent full compliance with the buy-through provisions will eventually require complete addressability, it is abundantly clear that small systems, including even some systems with considerably more than 1000 subscribers, would be heavily burdened by this requirement with a likely impact on subscription rates. Several commenters have submitted estimates of the costs which would have to be incurred to upgrade a system to full addressability. CRB, for example, maintains that it would cost $1.2 million to upgrade a 5000-subscriber system including necessary computers, controllers, hardware, service time, and converters. The Coalition maintains that the minimal headend costs alone for a system with 1000 subscribers would be in excess of $25,000. Newhouse suggests a $50,000 headend controller cost, plus $2000 per channel for encoding and $140-200 for each installed addressable converter.

29. Based on these cost estimates, we believe that there may well be a basis for a waiver of some type for smaller systems from the necessity for reconstructing to achieve compliance by the end of the ten-year transition period.[36] This is, however, a matter that we believe is better addressed at a point in time closer to that compliance date. As that date approaches, it should be possible to obtain a much better record as to the costs of compliance and to make a more informed judgment as to what an appropriate small system definition might be. In addition, there may be developments that will facilitate centralized management of the addressing function so that even small systems located considerable distances apart may share a common control facility that will enable such small systems to add addressable features such a pay-per-view programming as well as comply with the buy-through provision. Finally, to the extent that some measure of compliance is feasible short of full addressability and the necessary equipment is actually installed, we see no reason why that measure of compliance should not be mandated at that time.

30. *Evasions of the Buy-Through Prohibition.* We sought comment in the *Notice* concerning whether "there are distinct issues of evasion specific to the 'buy-through' provisions of the Act. . . ."[37] Massachusetts and Cablevision suggest that §623(h) of the Act, which concerns evasions generally, can be utilized to prevent or to redress pricing evasions of the prohibition. Massachusetts also warns that cable operators could seek to reconfigure their service offerings in attempts to evade the prohibition's effect. InterMedia, however, claims that it is a permissible marketing strategy to offer programming once marketed on a per-channel basis as part of a multi-channel tier. Newhouse and Time Warner urge that evasions of the prohibition be narrowly defined. Newhouse would only find an evasion in the deliberate reconfiguring of an addressable system to be incapable of complying with the buy-through prohibition, but it cautions that compliance with franchising or compatibility requirements should not be considered an evasion. Time Warner agrees with Newhouse but also would consider it to be an evasion

> if a cable operator with a system which is not fully addressable throughout the system's service area deliberately stops or substantially delays its schedule of implementing full addressability for the sole reason of avoiding the anti-buy-through prohibition, and contrary to a schedule for deployment of addressability as agreed to in a franchise. . . .

31. Clearly, deliberate reconfiguration of an addressable system in order to preclude compliance with the buy-through prohibition is an evasion of the prohibition. We also note that §623(h) of the Act specifically includes "evasions that result from retiering . . ." as an area of concern.[38] Nevertheless, given all the factors that must be considered in any specific case to determine, for example, whether a particular action is an evasion rather than compliance with another requirement,[39] we find it neither feasible nor desirable to attempt to comprehensively catalogue conduct that might be judged evasive. Generally, however, actions not taken to accomplish legitimate technical or customer service objectives that have the effect or are intended to delay or frustrate compliance with the

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[35] 47 U.S.C. §543(i). *See* 138 Cong. Rec. S14608-09 (September 22, 1992) (statement of Senator Inouye) ("It is my intention that the FCC should take particular account of the problems that small cable systems may have in complying with the anti-buythrough provision.").

[36] Our rules and regulations for cable television have regularly sought to reduce burdens and costs of compliance on small systems by establishing a 1000-subscriber threshold for applicability. *E.g.*, 47 C.F.R. §76.67(f) (local sports blackouts); 47 C.F.R. §76.95(a) (network program nonduplication); 47 C.F.R. §76.156(b) (syndicated program exclusivity); 47 C.F.R. §76.305(a)(records maintenance); 47 C.F.R. §76.601(e) (performance tests).

[37] *Id.* at 8674 n.8. Section 623(h) (47 U.S.C. §543(h)) is applicable to the rate provisions of the Act generally and is not limited by its terms to buy-through provisions. It states:

> Within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

[38] 47 U.S.C. §543(h).

[39] For example, §17 of the Act directs the Commission to issue regulations, within 18 months from the date of enactment of the Act (*i.e.*, by April 5, 1994), on methods of assuring compatibility between consumer electronics equipment (*e.g.*, television and VCRs) and cable systems, consistent with the need to prevent theft of cable service. We recognize that these compatibility requirements might affect certain technical aspects of the Act's buy-through prohibition, as well as a determination of whether a particular action is an evasion.

buy-through requirement are prohibited. We specifically recognize in this regard that the ability of systems to comply may be affected by legitimate changes in system operations that are undertaken to achieve compliance with other federal or local regulatory requirements, to improve the technical quality of service, to reduce costs and rates, or to offer service in a more "consumer friendly" fashion. Although subject to review, such actions are not *per se* prohibited. We are cognizant, too, of the Act's mandate in this area that we "periodically review and revise such standards, guidelines, and procedures,"[40] and we will from time to time do so to make sure that the requirements of the law are not being evaded.

III. ADMINISTRATIVE MATTERS

Regulatory Flexibility Act Final Analysis.

32. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need for and purpose of this action. This action is taken to implement §3(a) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, relating to prohibitions on buy-through marketing practices. This *Report and Order* prescribes rules to prohibit buy-through requirements, to prohibit discrimination between basic-only and other subscribers, to prohibit evasions of these rules, and to reduce burdens and costs of compliance on small systems.

Summary of issues raised by public comments in response to the initial regulatory flexibility analysis. Commission assessment, and the changes made as a result.

A. *Issues raised.* No issue or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment.* Because there were no comments directed to the initial regulatory flexibility analysis, the Commission views the initial analysis as correct and no additional assessment is necessary.

C. *Changes made as a result of such comments.* None.

Significant alternatives considered and rejected.

The Commission considered all the alternatives presented in the *Notice* and considered all the comments directed to the various issues in the *Notice*. In those cases in which commenters proposed alternatives that were less burdensome on cable operators and which would not detract from Congress' mandate to the Commission to implement the Act, these proposals were adopted.

33. *Effective Date.* The rules adopted herein will become effective on **October 6, 1993** in order that compliance with these requirements may be coordinated with related matters adopted or under review in Docket 92-259 (mandatory broadcast signal carriage and channel position requirements) and Docket 92-266 (rate regulation). Accordingly, IT IS ORDERED that, pursuant to §§4(i), 303(r), and 624(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(r), and 544(e), Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix B, effective **October 6, 1993.**

34. IT IS FURTHER ORDERED that MM Docket No 92-262 is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

1. Adelphia Communications Corporation, *et. al.*
2. Blade Communications, Inc. *et. al.*
3. Cablevision Systems Corporation
4. Coalition of Small System Operators
5. Cole, Raywid & Braverman
6. Community Antenna Television Association, Inc.
7. Consortium of Small Cable System Operators
8. Continental Cablevision, Inc.
9. Cox Cable Communications
10. Discovery Communications, Inc.
11. Electronic Industries Association Consumer Electronic Group
12. ENCORE Media Corporation
13. InterMedia Partners
14. Massachusetts Cable Television Commission
15. National Association of Telecommunication Officers and Advisors, *et. al.*
16. National Cable Television Association, Inc.
17. National Cable Television Cooperative, Inc.
18. Newhouse Broadcasting Corporation
19. New Jersey Office of Cable Television
20. Tele-Communications, Inc.
21. Time Warner Entertainment Company, L.P.
22. USA Networks and ESPN, Inc.
23. Viacom International, Inc.

Reply Comments

1. Blade Communications, Inc., *et. al.*
2. City of Cincinnati, Ohio
3. Coalition of Small Systems Operators
4. Cole, Raywid & Braverman
5. Community Antenna Television Association, Inc.
6. Continental Cablevision, Inc.
7. ENCORE Media Corporation

[40] 47 U.S.C. §543(h).

8. National Association of Telecommunications Officers and Advisor, *et. al.*

9. National Cable Television Association, Inc.

10. Newhouse Broadcasting Corporation

11. Prime Cable

12. Tele-Communication, Inc.

13. Time Warner Entertainment Company, L.P.

14. Viacom International, Inc.

APPENDIX B

RULES

Part 76 of Chapter I of Title 47 of the Code of Federal Regulation is amended to read as follows:

Part 76 - Cable television service

1. The authority citation for Part 76 is revised to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460; 47 U.S.C. §§532, 533, 535, 543, 552

2. Section 76.900 is added to read as follows:

§76.900 Buy-through of Other Tiers Prohibited.

(a) No cable system operator may require the subscription to any tier other than the basic service tier as a condition of subscription to video programming offered on a per channel or per program charge basis.

(b) A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per-channel or per-program charge basis.

(c) Prior to October 5, 2002, the provisions of paragraph (a) of this section shall not apply to any cable system that lacks the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service:

1) By controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point or

2) Through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.

(d) Any retiering of channels or services that is not undertaken in order to accomplish legitimate regulatory, technical, or customer service objectives and that is intended to frustrate or has the effect of frustrating compliance with paragraphs (a) - (c) of this section is prohibited.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-85

In re Applications of

SUN OVER JUPITER BROADCASTING, INC.	File No. BPH-890913MG
TRIPLE J PROPERTIES, INC.	File No. BPH-890913MI
INTERMART BROADCASTING OF PALM BEACH, INC.	File No. BPH-890914MG
TERRY D. MOORE d/b/a PELICAN BROADCASTING	File No. BPH-890914MK
AFRO-AMERICAN BROADCASTERS LIMITED	File No. BPH-890914MS
MARILYN BIRK	File No. BPH-890914MV
LIGHTHOUSE BROADCASTING, INC.	File No. BPH-890914MZ
MANUEL PALAU	File No. BPH-890914NX
JUPITER RADIO BROADCASTING, INC.	File No. BPH-890914OE

For Construction Permit for a
New FM Station on Channel 288A
in Jupiter, Florida

Appearances

Eugene F. Mullin, Howard A. Topel, and *Christopher A. Holt,* on behalf of Sun Over Jupiter Broadcasting, Inc.; *Ann C. Farhat,* on behalf of Triple J Properties, Inc.; *Gary S. Smithwick* and *J. Daniel Gillick,* on behalf of Intermart Broadcasting of Palm Beach, Inc.; *Howard M. Liberman,* on behalf of Terry D. Moore d/b/a Pelican Broadcasting; *Nora F. Garrote,* on behalf of Afro-American Broadcasters Limited; *Michael R. Miller,* on behalf of Marilyn Birk; *Susan Wing* and *Jacqueline P. Cleary,* on behalf of Lighthouse Broadcasting, Inc.; *Margot Polivy,* on behalf of Manuel Palau; *Stephen Diaz Gavin,* on behalf of Jupiter Radio Broadcasting, Inc.; and *Y. Paulette Laden,* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 25, 1993; Released: April 2, 1993

Preliminary Statement

1. Thirty eight applicants filed for a new FM station on Channel 288A in Jupiter, Florida. Nine applicants remain. They are Sun Over Jupiter Broadcasting, Inc. (Sun), Triple J Properties, Inc. (Triple J), Intermart Broadcasting of Palm Beach, Inc. (Intermart), Terry D. Moore d/b/a Pelican Broadcasting (Pelican), Afro-American Broadcasters Limited (Afro-American), Marilyn Birk (Birk), Lighthouse Broadcasting, Inc. (Lighthouse), Manuel Palau (Palau) and Jupiter Radio Broadcasting, Inc. (JRBI).

2. In the *Hearing Designation Order* (HDO), released May 21, 1991 (DA 91-500), 6 FCC Rcd 2833 (1991), the Commission designated the following issues against the remaining parties:

> (i) To determine whether there is a reasonable possibility that the tower height and location proposed by Intermart and Afro-American would constitute a hazard to air navigation.
>
> (ii) To determine whether Birk and Palau have reasonable assurance of the availability of their proposed transmitting antenna sites.
>
> (iii) If a final environmental impact study is issued with respect to Birk and Palau, in which it is concluded that any of the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
>
> (iv) To determine which of the proposals would, on a comparative basis, best serve the public interest (including a comparison of the areas and populations to be served by the applicants).
>
> (v) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. The HDO also calls for comparative coverage evidence to be taken under the standard comparative issue (see paragraph 26).

4. The Presiding Judge resolved the air hazard issue in favor of Intermart (*Order,* FCC 91M-2154, released July 11, 1991), and Afro-American (*Memorandum Opinion and Order,* FCC 91M-2155, released July 11, 1991).

5. The site availability issue was resolved in favor of Birk (*Order,* FCC 91M-2949, released September 27, 1991) and Palau (*Order,* FCC 91M-2577, released August 20, 1991). The Presiding Judge accepted information on the environmental impact issue submitted by Birk (Letter 8920-BFM, issued February 24, 1992; *see also Orders,* FCC 92M-259, released February 27, 1992 and FCC 92M-390, released March 27, 1992 (issue deleted) and by Palau (*Order,* FCC 91M-2097, released July 8, 1991).

6. Prehearing conferences were held on August 7, 1991 and October 18, 1991. An admissions session was held on January 6, 1992. Hearing sessions commenced on January 15, 1992 and concluded on January 24, 1992, with an

additional session held on February 12, 1992 to conduct cross-examination of Birk. Proposed findings of fact and conclusions of law were filed on April 13, 1992, and reply findings and conclusions were filed on April 27, 1992. The record was closed by the Presiding Judge on March 10, 1992 (*Memorandum Opinion and Order*, FCC 92M-301, released March 10, 1992). The record was reopened on March 23, 1992, in order to conduct further examination of Jupiter Communications Radio Group, Inc. (JCRP) relative to an added financial qualifications/§ 1.65 issues against that applicant (*Memorandum Opinion and Order*, FCC 92M-359, released March 23, 1992). The record was re-closed as a result of the dismissal of JCRG's application. See *Order*, FCC 92M-685, released June 17, 1992.

Findings of Fact

Areas and Populations

7. The following table shows the total area and population proposed to be served by each applicant. Joint Engineering Exhibit at Table II. The date shown for Afro-American consists of area and population predicted to be served pursuant to Afro-American's original proposal, and that which would be served pursuant to two amended proposals.[1]

TOTAL AREAS AND POPULATIONS

Applicant	Area (sq. km.)	Population
Sun	1,070	209,600
Triple J	1,390	295,300
Intermart	1,110	213,000
Pelican	1,370	288,100
Afro-American		
original proposal	1,260	203,400
1/8/90 amendment	1,620	289,900
6/20/91 amendment	1,820	266,300
Birk	1,050	204,600
Lighthouse	1,440	304,600
Palau	950	186,400
JRBI	1,220	246,700

Other Comparative Considerations

Sun Over Jupiter Broadcasting, Inc.

Ownership Structure and Control

8. Sun Over Jupiter Broadcasting, Inc. (Sun) is a corporation organized and existing under the laws of the State of Delaware. Sun Ex. 1, p. 1. Sun is authorized to issue one thousand (1,000) shares of common stock, consisting of five hundred (500) shares of Series A voting stock and five hundred (500) shares of Series B non-voting stock. Sun Ex. 1, p. 1; Tr. 310-311. Five hundred (500) shares of Series A voting stock have been issued and are outstanding. No shares of Series B non-voting stock have been issued. Sun Ex. 1, p. 1; Tr. 311.

9. George E. Pine, Jr. is the sole principal of Sun and owns 100% of the company's outstanding stock. Sun Ex. 1, p. 1; Tr. 310. Pine is President, Secretary, and Treasurer of the corporation, and serves as its sole Director. Sun Ex. 1, p. 1. Pine initially organized Sun with two classes of stock with the thought that there might be other investors. Tr. 312. However, Pine subsequently reconsidered his desire to have other investors and decided to proceed with the application on his own as the corporation's sole stockholder. Tr. 312. He does not plan to have any investors in the future. Tr. 312-313.

Integration

10. Pine proposes to work full time at the proposed station as General Manager with ultimate supervisory responsibility over all station operations. He will establish and implement station policy, supervise and coordinate all department heads and generally supervise all station employees. Sun Ex. 1, p. 1.

11. Pine has been employed by McGavern Guild Radio in the radio advertising business since 1973, in various positions, beginning as an account executive and culminating in his present position as Executive Vice President for the Eastern Division and Regional Executive of McGavern Guild's parent company, The Interep Radio Store. In the event of a grant, Pine will resign as an officer and employee of McGavern Guild and The Interep Radio Store and relinquish his approximately 2% holding in the company's stock. Sun Ex. 1, p. 2.

12. Prior to his employment with McGavern Guild, Pine was employed as a Media Planner at Ogilvy and Mather in 1972-1973 immediately after graduation from college. Sun Ex. 1, p. 3. During his school years, Pine worked summers and part time at various radio stations (Sun Ex. 1, pp. 2-3):

> Station WDDT(am), Greenville, Mississippi, summers and holidays, 1965-1969, sales and disk jockey;
>
> Stations WICB (AM)/FM, Ithaca, New York, part-time student staffer at college station, 1968-1972 -- account executive 1968-1969, sales manager 1969-1970, and general manager 1971-1972;
>
> Station KNOW (AM)/FM, Monroe, Louisiana, summer 1971, sales.

13. Pine has not been employed at a radio station since he finished college in 1972. Tr. 326.

14. In the event of a grant of Sun's application, Pine proposes to relocate his full time residence to North Palm Beach, Florida, a community within the proposed 1 mV/m contour where he has owned a condominium apartment since October 1987. Sun Ex. 1, p. 6; Tr. 332. Pine states that since October 1987 he has spent an average of 4-6 days per month and vacation time in North Palm Beach. Sun Ex. 1, p. 6. At the present time, Pine is a full-time rssident of New York City, where he has worked for 20 years and where he has owned a cooperative apartment for the past 15 years. Tr. 320. Pine is not involved in any civic activities in Florida. Tr. 321.

[1] The last date for filing pre-designation amendments of right or "B cut-off date" in this case was January 10, 1990. See HDO, paragraph 23.

Diversification

15. George Pine has been an officer and director of the licensees of various radio stations although he has not been employed at those stations: The River Broadcasting Company, Inc., licensee of Stations WNIX(AM), Greenville, Mississippi and WIQQ(FM), Leland, Mississippi; and New Market Media Corporation, licensee of Stations WSVS(AM)/WTQR(FM), Winston-Salem, North Carolina; KXXY(AM) and FM, Oklahoma City, Oklahoma; WREC(AM)/WEGR(FM), Memphis, Tennessee; and WNOE AM and FM, New Orleans, Louisiana. In addition, Pine and his wife Claude own a less than 1% interest in First Sierra Communications, licensee of Stations KQIZ-FM, Amarillo, Texas; and KIXX-FM, Manitou Springs, Colorado. Sun Ex. 1, pp. 4-6. Pine and his wife made a timely divestiture commitment with respect to all of the foregoing broadcast interest. *Id.* at p. 7.

Auxiliary Power

16. Sun proposes to equip the station with auxiliary generating equipment.

Triple J Properties, Inc.

Ownership Structure and Control

17. Triple J Properties, Inc. (Triple J) is a corporation organized under the laws of the State of Florida. Triple J Ex. 1, ¶ 1. Triple J has one class of stock. Triple J Ex. 4, ¶ 1. The principals of Triple J and their respective ownership and/or positional interests in the corporation are as follows:

Name	% Stock	Office Held	Director
Sandra Corr Jordan	51%	President Treasurer	yes
Elena F. Gostic	24.5%	Vice President	yes
Mary Imle	24.5%	Secretary	yes
Rhomell Burke	0	None	yes
Vincent W. Farhat	0	None	yes

See Triple J Ex. 4.

18. The shareholders each executed subscription agreements for their respective proportionate share of stock ownership (Reyes Ex. 7 (Ms. Jordan's agreement); Afro-American Ex. 5 (Ms. Gostic's agreement); JCRG Ex. 10 (Ms. Imle's agreement)) in January 1990, prior to the cut-off date. Each has contributed proportionately in accordance with their respective ownership shares, although done as deemed necessary in order to pay for costs associated with the application rather than by a strict following of the schedule set forth in the subscription agreements (Ms. Jordan, $13,010, Ms. Gostic, $6,250, Ms. Imle, $6,250). Triple J Ex. 14, Tr. 447, 477-480.

Integration

19. *Sandra Corr Jordon*, a white female, will serve as the General Manager of the new Jupiter station if Triple J is awarded the construction permit, working a minimum of 40 hours per week. Triple J Ex. 1, ¶ 7. In this position, she will direct and supervise overall station operations, including hiring, firing, and promotion of station employees, equal employment opportunity compliance, interface with legal and engineering counsel, representing the station before the community, and oversight over station programming, sales and financial activities. *Id.* Jordon will also participate in determining all major station policies. *Id.* Jordan maintains the corporate checkbook for Triple J and is the only person authorized to sign checks on behalf of Triple J. Tr. 355, 523.

20. Jordon holds a Bachelor of Science equivalent degree in Nursing Education from Michigan State University and for the past three years has taken nursing courses at Palm Beach Community College, with two courses remaining for eligibility to take the state of Florida board exam. Triple J Ex. 1, ¶ 3. If Triple J's application is granted, Jordan will resign from any current employment and will terminate or reduce as necessary any involvement she may have in any business or other activity, including nursing activities. However, she may engage in nursing activities up to 12 hours per week. Triple J Ex. 1, ¶ 8; Tr. 562-563.

21. Jordan was born on February 6, 1942. Since December 1987 she has resided at 17026 Traverse Circle, Jupiter, Florida, Triple J's proposed community of license. Jordan will continue to reside in Jupiter, Florida.[2] From May 1983 until December 1987 she resided in Tequesta, Florida, a community directly adjacent to Jupiter, and within Triple J's proposed service area. Triple J Ex. 1, p. 1.

22. Jordan has been active and/or continues to be involved in the following community and civic activities in Jupiter, and in Tequesta and other communities in Triple J's proposed service area:

-- Member, First United Presbyterian Church Pre-School Advisory Board, Jupiter-Tequesta, Florida (1985-1986). Studied community needs for pre-school facility open to the public.

-- Chair, First United Presbyterian Church Long Range Planning Committee, Jupiter-Tequesta, Florida (August 1986-July 1988). Evaluated and assessed future needs to accommodate growth of the church and outreach to the community; reviewed needs for pastoral counseling and parish family care for residents

[2] On December 30, 1991, Jordan was married. Her spouse, J. Danforth Browne, lives in Odessa, Florida, a suburb of Tampa, approximately 200 miles northwest of Jupiter. Prior to her marriage, Jordan discussed her fulltime commitment to work as General Manager at Triple J's proposed station and to maintain her residence in Jupiter, whether or not Triple J's application is successful. Her spouse fully supports her commitments. Jordan expects to spend additional time in Odessa/Tampa, Florida during the pendency of this proceeding, but will continue to maintain her Jupiter residence and intends to be in Jupiter on a weekly basis. Her spouse's current plans are to maintain his Odessa residence. However, he has recently retired from his law firm, has independent business interests and is also a licensed pilot, with access to private planes which would permit him to travel to Jupiter (an approximate 45 minute flight) to live with Jordan during the week and/or weekends in Jupiter. Triple J Ex. 1A, pp. 1-2; Tr. 567.

of the community; established priorities for youth and elder members of the community in programs of outreach and service.

-- Member, "Home Delivered Meals," Delivered meals prepared by Jupiter Hopsital to area shut-ins, the handicapped and the elderly within the Jupiter and Tequesta area (1985-1988).

-- Member, Ad Hoc Committee, Jupiter, Florida (July 1988-August 1989). Responsible for the initiation and prosecution of a petition for an ecclesiastical hearing for the removal of, and for disciplinary action against, the minister of the First United Presbyterian Church for misconduct involving young people in the church. Her responsibilities included conferring with other members including Triple J shareholder Mary M. Imle to determine the need for an investigation, conferring with church superiors regarding procedure, preparation of written charges, gathering of information and witnesses, presenting evidence before the church-constituted Board of Inquiry and substantially financing the entire investigatory process. Her involvement totalled hundreds of hours.

-- Member, Rosarian Academy Advisory Board, West Palm Beach, Florida (1987-1989). Assisted in fundraising activities for the high school.

Triple J Ex 1, pp. 2-3.

23. *Elena F. Gostic*, an Hispanic female, will serve as the Sales Manager of the new Jupiter station if Triple J is awarded the construction permit, working a minimum of 40 hours per week. Triple J Ex. 2, ¶ 6. In this position, she will manage and direct the sales staff and sales activities, including overseeing all commercial sales accounts, setting station policies for the sale of commercial advertising time, developing sales strategies and goals, and directly supervising sales personnel. *Id.* Gostic will participate in determining all major station policies. *Id.* Jordan, however, as the controlling 51% shareholder will have final say on all major station policies, including in the area of sales. Tr. 383-384, 386.

24. Gostic holds a Bachelor of Arts degree from the College of Notre Dame, Baltimore, Maryland. Triple J Ex. 2, ¶ 3. She has been employed for the past three years at the Benjamin School, North Palm Beach, Florida, where she teaches Spanish and Biology. *Id.* If Triple J's application is granted, Gostic will resign from her current employment and terminate or reduce as necessary any involvement she may have in any business or other activity. Triple J Ex. 2, ¶ 6.

25. Gostic was born on February 16, 1957 in Santiago, Cuba. She became a United States citizen on July 6, 1976. Since March 1989, she has resided at 9930 S.E. Buttonwood Way, Tequesta, Florida, approximately one mile north of Jupiter, Triple J's proposed community of license. Tequesta, Florida is directly adjacent to Jupiter and within Triple J's proposed service area. Gostic will continue to reside at her current Tequesta residence in the event Triple J's application is granted. From September 1988 to March 1989 she resided in Palm Beach Gardens, Florida (within the service area of Triple J's proposed station). From September 1980 until September 1988 she resided in Jupiter, Flordia (Triple J's proposed community of license). Triple J Ex. 2, pp. 1-2.

26. Gostic has been and/or continues to be involved in the following community and civic activities in Jupiter, in the contiguous community of Tequesta and in North Palm Beach, Florida, which is within the proposed service area of Triple J's station:

-- Involved in the start-up of a St. Jude's Catholic Church youth group, including the attendance at a meeting of the forming committee (in August/September 1991).

-- Volunteer, St. Ignatius Loyola Cathedral, Palm Beach County, Florida. Delivered meals to the hungry each Thanksgiving (1986 to the present) (approximately three hours each year).

-- Volunteer, Jupiter Junior Women's League "Festival of Trees" charitable fundraiser (1987) (approximately 6 hours devoted to this event).

-- Organizer, La Petite Academy Halloween Spook House, Jupiter, Florida, 1986 and 1987 (approximately three weeks each year devoted to this fundraiser which provides its proceeds to the Muscular Dystrophy Association).

-- Committee Member, Jupiter/Tequesta Athletic Association Girls Softball Fundraising Committee (1991) (approximately three to four hours per day three days a week over a three-week period devoted to this event). Also served as weekend "room mom" supervisor for approximately five weekends during the girls softball season in 1991.

27. *Mary M. Imle*, a white female, will serve as the News Director of the new Jupiter station if Triple J is awarded the construction permit, working a minimum of 40 hours per week. Triple J Ex. 3, ¶ 5. In this position, she will manage, direct, supervise, and oversee all aspects of the station's news staff, local news gathering activities, and contacts with area civic leaders and newsmakers, including the production and scheduling of local news and informational programming and the selection and scheduling of news and informational programming from other sources. *Id.* Imle will also participate in determining all major station policies. *Id.* However, like in the case of Gostic, Jordan will have the final say on all major station matters, including in the area of news. Tr. 504, 508.

28. For over ten years (1967-1978), Imle, who was 64 years old at the time of her testimony, was employed by the Illinois State Senate in Springfield, Illinois, where she served as fulltime secretary to the various senate leaders. From 1978 to November 1980, she was in public relations, employed by the Regional Transportation Authority in Chicago, in charge of West Suburban Cook County. *Id*, at p. 1. In 1980, Imle retired and moved to Jupiter. Tr. 474. She has resided in Jupiter since that time and will continue to reside in Jupiter in the event Triple J's application is granted. Triple J. Ex. 3, p. 1.

29. Since 1981, Imle has been and/or continues to be involved in the following community and civic activities in Jupiter, and in Tequesta and other communities in Triple J's proposed service area:

-- Weekly Volunteer, Jupiter Hospital, Jupiter, Florida (February 1982 - present, approximately 8 hours per week); Volunteer Manager, Jupiter Hospital Gift Shop, Jupiter, Florida (1983, approximately 24 hours per week).

-- Member (trained volunteer), Jupiter Hospital Disaster Team, Jupiter, Florida (1987 to present, approximately 6 hours per year).

-- Member, Jupiter Hospital Auxiliary Pink and White Ball, Jupiter, Florida (Member, Advisory Committee, 1984 to present, Decorating Committee, 1984 to present, Invitations Committee, 1985 to present, Raffle Committee, 1983 to present (also served as Co-Chair in 1983), approximately 50 hours per season); Chair, Jupiter Hospital Pink and White Ball, Jupiter, Florida (1984, approximately 70 hours). Also served as a member of the Jupiter Hospital Pro Am Charity Golf Classic Ladies Committee for four years (8 hours per year).

-- Member of founding Board of Directors (also Vice President, 1982-1988), Help the Hungry at Home, Inc., Jupiter, Florida (an organization formed in 1982 to raise funds to purchase food and distribute it to the needy. The organization also produces opera concerts (Blowing Rocks Music Festival) in order to raise funds), approximately 24 hours per season (also served as Chair of the Publicity Committee, 1983 to 1985, and presently), and a Member of the Board, 1982-1988, and presently).

-- President and Member, Board of Trustees, *First United Presbyterian Church*, Jupiter-Tequesta, Florida (1983-1987), approximately 6 hours per week; Sunday School Teacher, for four- and five- year old children (1987, approximately 2 1/2 hours per week); Chair, Annual Halloween Party, 1987 and volunteer organizer, since 1987, approximately 10 hours per year); Member, Participant/Leader, Pony Express (member contact project), 1987 to present (average 10 hours each year); Volunteer, Annual Strawberry Festival, 1983 to 1987 (Co-Chair, Kitchen Operations Committee, 1986), approximately 20 hours each year. This event raises scholarship funds to assist area young people to continue their education and attend youth camps; Volunteer, Christmas Land, 1986 to present, approximately 30 hours each year (church-sponsored event free to all community children).

-- Member, Ad Hoc Committee, Jupiter, Florida. From July 1988 to August 1989, Imle was actively involved with Jordan and others as members of an Ad Hoc Committee seeking the removal and/or discipline of the First Presbyterian Church pastor for alleged failures of moral certitude and administration. The process involved conferring with other members of the church, conferring with church superiors, preparing written charges, gathering of witnesses, presenting evidence before a board of inquiry and providing financial assistance in this endeavor (participation totalled hundreds of hours).

-- Volunteer and Co-Chair of fundraisers, Children and Family Services Holiday House, Palm Beach County, Florida, 1990 (approximately 8 hours) and 1991 (approximately 40 hours).

-- Director, Lighthouse Gallery Board of Directors, Tequesta, Florida, 1990 to present (approximately 4 to 6 hours per week). Imle has also served as Chair, Development Committee (1990), Member, Development Committee (1991), Member, Membership Committee (1990), Chair, Foundation Committee (1991), Chair, Lighthouse Gallery Beaux Arts Ball (1990), Member, Lighthouse Gallery Annual Christmas Party (1988) (all committee activities approximately 200 hours minimum each year).

-- Member, TequestaFest Planning Committee, Tequesta, Florida, 1990 to present (approximately 40 hours per season devoted to this activity which held its first annual festival in April, 1991 primarily for the benefit of the children in the community). *Id*, at pp. 2-3. Imle has been recognized for her civic involvement, including being named Citizen of the Month by the Jupiter Chamber of Commerce (February 1990) and Rookie of the Year for 1991 by the Lighthouse Gallery in Tequesta. *Id*, at pp. 3-4.

Diversification

30. Neither Triple J nor any of its officer, directors, or shareholders has any ownership interests in any medium of mass communications. Triple J Ex. 1 ¶ 8; Triple J Ex. 2, ¶ 7; Triple J Ex. ¶ 6; Triple J Ex. 4, ¶ ¶ 4-5.

Auxiliary Power

31. Triple J proposes to install emergency generating equipment at its studio and transmitting sites. Triple J Ex. 5.

Intermart Broadcasting of Palm Beach, Inc.

Ownership Structure and Control

32. Intermart Broadcasting of Palm Beach, Inc. (Intermart) is a Florida corporation. James E. Martin, Jr. is President, Treasurer, Director and holds 50% of the applicant's stock. Gary S. Smithwick holds 45% of the applicant's stock, but is neither an officer nor a director of the corporation. Patricia S. Fierro is Secretary and Assistant Treasurer of the corporation and holds 5% of the applicant's stock. At the time of the hearing, Harley P. Park was Vice-President of the applicant. Intermart Ex. 1, p. 1.[3]

Integration

33. No principal of Intermart will be integrated into management of the proposed station at Jupiter, Florida. Intermart Ex. 2, p. 1.

[3] Intermart subsequently amended its application on February 6, 1992, to report that Harley P. Park has resigned his position as an officer of the corporation. Official Notice taken.

Diversification

34. Intermart itself has no other media interests. Intermart Ex. 3, p. 1. However, James E. Martin, Jr. is President, Director and 66.67% stockholder of Intermart Broadcasting Georgia Coast, Inc. (IBGC), licensee of Station WGCO(FM), Midway, Georgia. *Id.* In addition, at the time the hearing commenced, Martin was President, Treasurer, Director and 90% stockholder of Intermart Broadcasting Orlando, Inc. (IBO), holder of a 35.7267% general partnership interest in Radio Orlando, licensee of Station WMMO(FM), Orlando, Florida, and also was President, Treasurer, Director and 100% stockholder of Intermart Broadcasting of Holmes Beach, Inc. (IBHB), holder of a one-seventh general partnership interest in 98.7 Partnership, permittee of Station WAYP-FM, Holmes Beach, Florida. *Id.*[4] Moreover, at the time Intermart filed its application, Mr. Martin was President, Treasurer, Director and 100% stockholder of Intermart Broadcasting of Las Vegas, Inc. (IBLV), licensee of Station KMMK(FM) [formerly KLTN], Las Vegal, Nevada. Intermart Ex. 3A, p. 1. Although KMMK was sold on May 15, 1992, Mr. Martin never made a divestiture pledge for this media interest. *Id.*

35. Patricia Fierro is Secretary and Assistant Treasurer of IBHB, and also is Assistant Treasurer of IBGC. Intermart Ex. 1, p. 1. Harley P. Park is Vice-President, Chief Financial and Administrative Officer of IBGC and IBHB. Intermart Ex. 3, p. 1. None of Intermart's principals pledged to divest themselves of their respective media interests upon the grant of Intermart's application.[5] [6]

Auxiliary Power

36. Intermart does not propose to install auxiliary power facilities.

Terry D. Moore d/b/a Pelican Broadcasting

Ownership Structure and Control

37. Terry D. Moore d/b/a Pelican Broadcasting (Moore) is a sole proprietorship. Terry Moore is the sole principal of the applicant and owns one hundred percent of the equity. Moore Ex. 1; Tr. 727.

Integration

38. Terry Moore proposes to be integrated into the day-to-day management of the proposed station as the full-time (at least 40 hours per week) general manager. Moore Ex. 1. In this capacity, Moore will be responsible for the overall supervision and direction of station affairs, including station construction, operation, news, programming and personnel, including EEO program administration. Moore Ex. 1. Moore intends to finance the construction and initial operation of the station from her own funds. These funds are not joint funds of her and her husband. Tr. 706-707. Her source of funds is an inheritance. Tr. 720.

39. In the event that her application for the Jupiter, Florida station is granted, Moore will give up her job as a waitress and move to Jupiter. Moore has been a waitress for approximately 25 years and has had no other paid employment during that time. Moore Ex. 1; Tr. 661, 683-684. In addition, Moore will resign from any other conflicting time commitments, in order to devote herself on a full-time basis to managing the station. Moore Ex. 1. Donald Moore, her husband, has no equity interest in the application. Moore has never discussed with her husband applying jointly for the station. Moore stated applying for the station was her idea. Mr. Moore, a radio and TV engineer, will assist in building the station and serve as her chief engineer on a part-time basis. Tr. 678, 720, 728. Mrs. Moore envisions her husband will have a full-time job in television. Tr. 728-729.

40. Mrs. Moore currently resides in Centerville, Massachusetts, and has lived in that state regularly since 1968. Tr. 707. In the event her application is granted, Moore intends to move with her husband to Jupiter, Florida, prior to commencement of broadcast operations. Moore Ex. 1; Tr. 683-684.

41. Moore claims enhancement credit for her part-time, unpaid broadcast experience. Tr. 661, 708. During 1966, Moore was a production volunteer for WGBH-TV, Boston, Massachusetts. In that capacity, she was a studio assistant for a variety of programs, including the "Elliot Norton Reviews", "Great Decisions--1966" News, and "W.S. History". In addition, she was an assistant stage manager for "The French Chief" with Julia Child. Moore Ex. 1. From 1965 to 1967, Moore worked as a student intern at Boston

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[4] Intermart subsequently reported in an amendment to its application dated February 6, 1992, that, pursuant to Commission approval, an assignement of the permit for WMMO(FM) was consummated on January 7, 1992 and an assignment of the permit for WAYP(FM) was consummated on January 27, 1992. However, Intermart can derive no comparative benefit from that belated amendment, and these media interests are therefore attributable to Intermart under the diversification criterion.

[5] The foregoing findings of fact are based upon information that Intermart included in the hearing exhibits that it proffered in this proceeding. Intermart Exhibits 1-3A. However, other public documents indicate that Intermart's exhibits exclude a number of media interests that Intermart principals held on or after the "B" cut-off deadline and which are therefore attributable to Intermart under the diversification criterion. Specifically, Intermart's exhibits exclude the fact that, at the time of the hearing, 45% Intermart owner Gary S. Smithwick held a 10% ownership interest in HBO. Intermart filed an amendment on December 6, 1991, evidencing Smithwick's ownership interest in IBO, of which official notice is taken. Moreover, Intermart's exhibits exclude the facts that Arthur V. Belendiuk, who owned 25% of Intermart's voting stock on the "B" cut-off deadline, also held: (1) a 20% general partnership interest in Ravena Broadcast Partners, permittee of WRAV-FM, Ravena, New York; (2) a 51% interest in Ohio Valley Broadcasting, Inc., permittee of WZTX-FM, Coal Grove, Ohio; (3) a 25% general partnership interest in New Age Broadcasting, permittee of WRJI-FM, Crooksville, Ohio; and (4) a 51% interest in Adventure Three, Inc., permittee of WBJY-FM, Shadyside, Ohio. The pertinent pages from Intermart's application evidence Belendiuk's 25% ownership interest in Intermart, and Intermart's amendment filed January 28, 1990, evidences Belendiuk's post-"B"cut-off ownership of the foregoing interests, of which official notice is taken.

[6] Similarly, Intermart's exhibits exclude the facts that: (1) Belendiuk subsequently acquired a 44% interest in Red Wolf Broadcasting Corporation (Red Wolf), permittee of a new FM station in Ledyard, Connecticut; (2) subsequent to the "B" cut-off deadline, Intermart Secretary, Assistant Treasurer, and 8% stockholder Patricia Fierro was Secretary and Assistant Treasurer of IBO and IBLV; and (3) subsequent to the "B" cut-off deadline Harley P. Park was Vice-President, Chief Financial and Administrative Officer of IBO and IBLV. Intermart's amendment filed June 10, 1991, evidences Belendiuk's ownership interest in Red Wolf, of which official notice is taken.

University's closed-circuit television station WBU-TV. She served in various production-related capacities, including serving as a writer, producer, director, switcher, stage manager, cameraman and in audio control. Moore Ex. 1. For her participation as an intern, Moore received academic credit. Tr. 686. From 1977 through 1985, Moore assisted in the management and operation of FM broadcast station WQRC, Barnstable, Massachusetts. Mrs. Moore's husband, Donald Moore, owned and was general manager of WQRC during those years. Tr. 686. At WQRC, Mrs. Moore assisted with remotes and specials approximately ten to twelve times a year. Tr. 687. She never had any managerial role at the station. Tr. 687. From 1985 through 1987, Mrs. Moore worked at WCVX, Vineyard Haven, Massachusetts. Moore Ex. 1. This was also a station owned by her husband, who was general manager and chief engineer. Tr. 687. Mrs. Moore assisted in construction and operation of the station. Moore Ex. 1. Mrs. Moore's participation in the construction and operation of the station consisted primarily of pulling electrical wires through the station ceiling and providing some suggestions as to programming. Tr. 688-690. Mrs. Moore has attended the NAB convention each year since 1976 and attended the Massachusetts Broadcasters Association convention from 1976 to 1987. Mrs. Moore has completed the coursework for a masters degree in broadcasting communications from Boston University's School of Public Communications. Moore Ex. 1.[7]

42. Mrs. Moore learned about the availability of the Jupiter FM frequency through the *M Street Journal*, a broadcast publication subscribed to by her husband. Tr. 663. Mrs. Moore retained counsel who has been a friend of Mr. Moore for 25 years and had previously provided communications law representation to Mr. Moore. Tr. 663-664, 707. Mrs. Moore prepared a "Projected Operating Expenses" statement. Her husband assisted her on the technical expenses portion. Tr. 664, 711; Moore Ex. 2. Mrs. Moore retained an engineer, Bernie Segal, to develop an engineering proposal for the application. Tr. 666. Segal also furnished the equipment costs. Tr. 666-667, 712. Mr. Moore assisted in the development of the proposal. Tr. 668. Specifically, her husband made a preliminary analysis of the Jupiter site and conveyed this information to the engineer. Tr. 668.

43. Mrs. Moore and her husband took a three-day trip to Jupiter to locate a transmitter site. Tr. 668. Mrs. Moore and her husband contacted a real estate agent for assistance in finding an appropriate site. Tr. 668-669. Mr. Moore's involvement included describing the technical requirements for the site to the real estate agent. Tr. 669. The Moores were unsuccessful in locating an appropriate transmitter site through the real estate agent. Tr. 668. Therefore, the Moores jointly wrote a letter to Kenneth Kelly of the MacArthur Foundation in an effort to locate a site. Tr. 669-670. Mr. Moore drafted the sections of the letter pertaining to maximum allowable power and site requirements. Tr. 670-671. Mrs. Moore was also unsuccessful in obtaining this site. Tr. 671. Mrs. Moore next contacted Gordon Ripma about a transmitter site. Ripma's name was given to her by her counsel. Tr. 672. Subsequently, Mr. Moore wrote to Ripma about the transmitter site. Tr. 672. Mrs. Moore testified that her husband wrote the letter due to its technical nature and his engineering expertise. Tr. 672-673.

44. After finding an appropriate transmitter site, Mrs. Moore had to change the site due to FAA problems. Tr. 674. Mrs. Moore hired an aviation consultant. Mr. Moore, on Moore's behest, worked with the consultant on the technical aspects. Tr. 674-675. Tr. 675. Mr. Moore has always kept her apprised of his technical assistance and has done nothing without her knowledge and approval. Tr. 722.

45. Mrs. Moore arranged on her own to have the lease notices published in the local newspaper. She also arranged to set up the public inspection filed without assistance from her husband. Tr. 720-721. The names of the local organization to be included in the EEO program were gathered by Mrs. Moore's Jupiter real estate agent. Tr. 675.

Diversification

46. Neither Mrs. Moore nor her husband have any other media interests. Moore Ex. 1.

Auxiliary Power

47. Mrs. Moore proposes to obtain and install auxiliary power supplies at the studio and transmitter sites to assure the station's ability to operate in the event of power outages. Moore Ex. 1.

Afro-American Broadcasters Limited

Ownership Structure and Control

48. Afro-American Broadcasters Limited (Afro-American) is a Florida limited partnership. The Certificate of Limited Partnership was filed with the state of Florida on September 14, 1989. According to the affidavit to the Certificate of Limited Partnership executed before a notary public on September 13, 1989, by Jimmie Horne, Jr., Horne stated that he was the general partner of Afro-American, authorized to swear out the affidavit, and that the total amount of capital contributions of the limited partners and the total amount anticipated to be contributed by the limited partners is $317,000. Afro-American Ex. 1, p. 1 and Att. A, p. 3. As of September 13, 1989, however, no principal of Afro-American had entered into any written agreement concerning the formation of a limited partnership. *Id.*

49. The purported sole general partner of Afro-American is Jimmie Horne, Jr., holding a 30% equity interest. The purported sole limited partner, Kenneth Dawson, of Boca Raton, Florida, holds a 70% equity interest. Afro-American Ex. 1, p. 1.

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[7] Mrs. Moore left graduate school because of her mother's illness and returned home. She applied for a job at a radio station owned by by her husband. She married Mr. Moore but never got the job. Moore decided to stay at her job as a waitress when Mr. Moore's children came to live with them so she could spend more time with the children. Later, her hope to work at the radio station was dashed when Mr. Moore sold the radio station. Moore regards the Jupiter application as her chance finally to work in radio. Her applying for the Jupiter frequency was dictated in part by her desire to be near a big enough city that her husband could get a job in television. Tr. 722-723.

50. An Agreement dated September 14, 1989 (the same day Afro-American's application was filed with the FCC) (the "short partnership agreement") between Afro-American principals Horne and Dawson was superseded by a subsequently executed Limited Partnership Agreement dated January 5, 1990 (the "formal partnership agreement"). Afro-American Ex. 1, Att. B, pp. 1-2 of short partnership agreement, and pp. 1, 15-16 (¶ 11.10) of formal partnership agreement. Both agreements provided that the general partner will make a capital contribution of $2,300 (which represents less than one (1%) percent (actually 00.74%) of the total cash contributions to the partnership) and that the limited partner will make a maximum contribution of $312,000 (rather than $317,000 as stated in the affidavit accompanying the certificate of limited partnership) (which represents 99.26% of the total cash contributions to the partnership). Afro-American Ex. 1, Att. B, pp. 1-2 (¶ ¶ 3, 6) of short partnership agreement, and p. 2 (¶ 2.1) of formal partnership agreement.[8] Neither Horne nor Dawson are obligated to make further cash contributions. *Id.*, p. 3 (¶ 2.4) of formal partnership agreement; Tr. 825, 991. In the event additional cash contributions are necessary, either or both principals may contribute additional cash, which may result in the dilution of the respective equity interests of the partners.[9] Afro-American Ex. 1, p. 3 (¶ 2.4) of formal partnership agreement; Tr. 937, 975-976.

51. The short and formal partnership agreements both include language designed to insulate the limited partner from becoming actively involved in the management and operation of Afro-American and its proposed station. *Id.*, at Att. B, pp. 1-2 (¶ 4) of short partnership agreement, (¶ 6.6) of formal partnership agreement. Dawson, who has served as a general manager at various radio stations in the past (including serving as Horne's boss at Station WPOM(AM)), has committed to personally provide all the funding for the construction and operation of the proposed station ($312,000) yet remain only an investor. Tr. 975-976, 1001; Afro-American Ex. 2, p. 9. Dawson has never contributed in excess of $300,000 in any business previously nor has he ever invested in any other business as a passive investor. Tr. 1067.

Integration

52. Jimmie Bo Horne, Jr., as the proposed General Manager, claims he will be the only principal of Afro-American integrated into management of the proposed Jupiter facility. Afro-American Ex. 2, p. 1. In the general manager capacity, Horne states he will oversee the operations of the station, ensure that all departments are operating in accordance with station policy and efficiently, and exercise ultimate decision-making authority over all areas of station policy including budget, sales, programming, FCC matters, involvement with the community, and equal employment opportunity. *Id.*

53. Horne, age 42, is a black male with a current stated residence at 361 West 21st Street, Riviera Beach, Florida (since 1974), which is located in the 60 dBu contour of Afro-American's proposed service area. Afro-American Ex. 2, pp. 1-2. He intends to relocate his residence to Jupiter if Afro-American receives the Jupiter construction permit. Afro-American Ex. 2, p. 2. Horne has previously resided at other locations within Afro-American's proposed 60 dBu contour; (i) in West Palm Beach, Florida (1338 Palm Beach Lakes Boulevard, 1962-1971 (including the time period of 1967-1971 when Horne was away at college but retained his legal residency at the West Palm Beach address)) and 1001 36th Street (1971-1974)); and (ii) in Riviera Beach, Florida (1950-1962). Afro-American Ex. 2, p. 2 and Atts. A-C; Tr. 748-780, 763, 783.

54. Horne is an entertainment consultant and a recording artist and performer. Tr. 740. Afro-American claims involvement by Horne in service area civic activities consisting of providing entertainment for fund-raising events and organizational groups for which Horne was not paid. These service area groups (in either West Palm Beach or Riviera Beach, unless otherwise noted) include: Suncoast Chamber of Commerce (1988); Say No to Dope Foundation (1987); Glades A.T.C. (Belle Grade) (outside service area, but activity performed in claimed service area (West Palm Beach) (1989); Minority Law Enforcement Agency (1988/1990); City of Rivera Beach (1988); City of Riviera Beach Department of Parks and Recreation (1989/1990); City of West Palm Beach (1988/1990); City of West Palm Beach Department of Parks and Recreation (1988); Sickle Cell Foundation (1985/1989); Urban League of Palm Beach County (1988); Cancer Foundation (1987/1990); Martin Luther King Birthday Committee (1988-1990); Bethune-Cookman Alumi (1987); Delta Sigma Theta Sorority (1986); Omegas Fraternity (1988/1990); Kappa's Palm Beach Chapter (1989/1990); Operation Clean Up (1987); Ebony Fashion Fair (1986); Ms. Black America (1988/1989); Sigma Gamma Rho (1989); Afro Arts Festival (1988); SunFest (1987); Kidney Foundation (1989/1990); Girl Scout Troop 246 (1986); Down With Dope - Up With Hope Foundation (1988); Gospel Benefit Concert (1989-1990); Elite Bridge Club (1987); Eldorado Club (1988); American Legion Post #199 (1990); J.F.K. Band Parents (1987); New Bethel Church (1991); Chauffeurs Club (1990); Palm Beach County School Board (mid-1970s); State Florida Division of Family Service (1970-1973); Student Chaperone - H.U.D. (1974-1978); Trinity United Methodist Church (1982); Shriner's Club (1983); Men's Club of The Palm Beach (1983); Tabernacle Baptist Church (1985); United Technologies Tennis Tournament (1985); Roosevelt Junior High School (1985); Lincoln High School (1983); Sickle Cell Parade (1987); American Legion Red and White Ball (1985); John F. Kennedy Middle School (1987/1989); Black Historical Society (1987). Afro-American Ex. 2, pp. 2-8, Tr. 906.

55. Horne seeks broadcast experience credit based on community affairs director position he held at Station WPOM(AM), Riviera Beach, Florida, from the winter of 1985 through 1987.[10] Afro-American Ex. 2, p. 9.

56. Afro-American's claim that Horne is the sole controlling partner and that Dawson has played a passive role is, as discussed, *infra*, not supported by the record. Dawson employed Afro-American's communications counsel (Ms.

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[8] The actual spelling out of the capital contribution required by the limited partner in the formal partnership agreement is Three Hundred Ten Thousand Dollars. Afro-American Ex. 1, Att. B (¶ 2.1b).

[9] The percentage of equity held by the general partner may not be diluted below 10%

[10] Horne's employment at Station WPOM(AM) may have actually carried over until August, 1988; however, Afro-American

Garrote and the firm of Piper & Marbury) to prepare and file an Expression of Interest dated September 22, 1988, on behalf of Dawson in the Jupiter relemaking proceeding. Dawson knew of Ms. Garrote by virtue of his involvement on behalf of his mother with an Orlando radio station of which his mother had been a part owner. Tr. 997. In that expression, Dawson supported the allocation of Channel 288A at Jupiter and evinced his intent to apply for the station if allocated, and if authorized, to build a station promptly. JRBI Ex. 8; Tr. 969-970. On October 21, 1988, Garrote, on behalf of Dawson, filed Reply Comments In Opposition To Comment and Counterproposal of U.S. Three Broadcasting Corporation, which had proposed to have the Channel 288A allocation made to White City, rather than Jupiter. Triple J Ex. 11. In support of his reply comments, Dawson attached his personal statement made under penalty of perjury reflecting that he had spoken with several community leaders associated with city government and business in Jupiter and coupled with his personal observations, concluded that Jupiter was a growing community in need of a radio station to serve its interests. Dawson further confirmed his intent to apply for the Jupiter station. *Id.*

57. Dawson learned in June 1989 that the allocation had been made to Jupiter. Initially, Dawson claimed he was aware of the Jupiter allocation by reading a broadcast publication. Tr. 965-966. When questioned further, Dawson conceded he may have known of the allocation by virtue of a communication from Garrote, including being provided with a document (JRBI Ex. 7) reflecting that the allocation was made to Jupiter. Tr. 967-969, 1041. In this connection, Garrote had provided Dawson with updates of the status of the rule making proceeding.

58. Despite Dawson's expressed intention to apply for a Jupiter station if the frequency was allocated made 7 months earlier to the Commission, in June 1989 Dawson was no longer interested in applying for a Jupiter station or even getting back into broadcasting. Tr. 965-966, 974. According to Dawson, the situation had changed in the intervening 7 month period. Dawson related that following the allocation, he consulted his mother and family and asked them for guidance as to what he should do:

> [I] was waivering on my decision as to getting back into broadcasting since all that time had elapsed and my health had gotten worse. A situation had come up in my life, and I wasn't certain I wanted to get back into broadcasting in 1989." Tr. 974.

Notwithstanding these reservations, Dawson readily agreed to become a partner with Horne in an application for a Jupiter station.

59. Dawson and Horne worked together at station WPOM(AM), Riviera Beach, Florida. Horne, worked there as public affairs director from 1985 to August 1988. Dawson worked at the station as general manager, Horne's supervisor, from June 1987 to March 1988. Afro-American Ex. 2, p. 9; Tr. 774, 978-979. In August 1988, Horne started up an entertainment consulting business called Creative Consultants. Since that time he and Dawson, an independent contractor with Horne and Creative Consultants, have been business associates and friends. Afro-American Ex. 2, p. 10; Tr. 741.

60. The Creative Consultants business (and related Joy Productions, Horne's entertainment booking entity) operate out of a home Horne maintains at 1451 40th Street, West Palm Beach, which includes an office that Horne and Dawson both use. Tr. 787, 992-993. The nature of Horne's and Dawson's business arrangement with Creative Consultants is that if either one refers a client to the other which results in the other party providing consulting services (Horne, for entertainment consulting, or booking through Joy Productions, Dawson, for advertising placement), the referring party gets a percentage of the fee in the range of 10% to 15%. Tr. 791-793, 934-936.

61. Dawson asserts that he did not inform Horne of the Jupiter allocation or his prior involvement in getting the channel established. Tr. 977-978. Rather, according to Horne, Horne learned of the allocation by reading the *Palm Beach Post* in June 1989. Tr. 769-770. Horne states he then contacted people he knew in the broadcasting business to get leads as to how much money he would need to fund the project and the names of persons who could provide the necessary funds. Tr. 770-774, 784. The record does not reveal the information gleaned from these contacts. Horne states that in that same month, after contacting approximately four persons to determine if they were interested, Horne approached Dawson. Tr. 784. Horne asserts he informed Dawson what he had found out about the allocation and Dawson responded that he knew about it and was "somewhat" interested. Tr. 784-785, 794-795.

62. Horne and Dawson apparently had at least two face-to-face meetings before it was decided that Horne would be the general partner, who would work fulltime at the station as general manager and that Dawson would put up substantially all of the money but would otherwise remain passive. Tr. 794-796, 987. The 30%/70% equity split was purportedly "negotiated" by virtue of Horne saying that he wanted 25% or 30% because he would be doing a lot of the work and Dawson agreeing to the 30% figure. Tr. 797-798, 987-989.

63. The determination that Dawson would put up $312,000 in return for his majority equity position was purportedly reached by Horne's preparation of a budget which provides that $262,950 is needed to construct and operate the proposed facility for three months. Without ever seeing the written budget nor apparently ever giving Horne a specific figure, Dawson told Horne that he should also provide for a cushion.[11] Tr. 1022-1023. The "cushion" apparently added in by Horne resulted in the total figure of $312,000. *Id.* Dawson has testified that he has contributed approximately $40,000 toward the $312,000 commitment, which has been deposited into the Afro-American partnership account and used for the applicant's prosecution costs. Tr. 991, 1023-1025. Dawson's required $312,000 commitment includes prosecution as well as the costs for construction and initial operation. Tr. 829-833, 1024-1025. Despite having committed to provide a significant amount of mon-

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is limited to the termination date of 1987 given by Horne in Afro-American's application, as amended as of right. *See* Tr. 122. Dawson's employment as General Manager of Station WPOM(AM) commenced in June, 1987 and terminated in March, 1988. Tr. 979.

[11] Dawson does not recall being told by Horne that approximately $270,000 was what Horne was looking for by way of budget figures. Tr. 1074-1076.

ey to Afro-American's venture -- $312,000 -- Dawson expressed no concern or interest in how the money has been spent by Horne. Tr. 991, 1023-1024, 1035-1037. Horne's $2,300 contribution figure is apparently based on the costs required to pay the application fee at the time ($1,800) and a site reservation fee ($500), purportedly reached through negotiations with Dawson and upon advice of counsel. Tr. 800, 961.

64. Dawson has not seen the Afro-American budget (Triple J Ex. 7), nor has he seen any financial information from Horne concerning Horne. Tr. 1032. Horne was provided with a statement of assets and liabilities of Dawson (JRBI Ex. 6).

65. Notwithstanding Dawson's expressed interest in the allocation of the Jupiter channel and his prior engagement of Garrote's legal services, Dawson claims that he never recommended or suggested Garrote to Horne. Tr. 977-978, 995. Horne claims to have informed Dawson that he "hired" Garrote. Tr. 996. Horne testified that Dawson told him that he, Dawson, knew Garrote, but Horne claims he learned of Garrote through April Wortham, the general partner of Minority Broadcasting Group Limited, a limited partnership applicant for a new FM radio station to operate in nearby White City, Florida. Tr. 821-823, 936. The White City applications were required to be filed by the same September 14, 1989, deadline as the Jupiter applications. JRBI Ex. 7, p. 2. Dawson confirms that he gave Garrote's name to Wortham but not Horne, yet he also acknowledges that he may have informed Horne that he knew Garrote. Tr. 996. Wortham is a friend of both Dawson and Horne, and she had been hired by Dawson to work at Station WPOM(AM) and worked there during a portion of the time period that he managed the station and Horne was employed there as well. Tr. 821-823, 1008, 1014. Horne states that he went to Wortham for information because he knew she was involved in radio station applications. When questioned further, Horne admitted that he knew Wortham had applied for White City, Florida. Tr. 821-823. Between 1988, when he left Station WPOM(AM), and the filing of Afro-American's application on September 14, 1989, Horne would meet with Wortham approximately twice a month. Tr. 927.

66. Although Horne had never been part of a formal limited partnership arrangement before, he testified that it was "absolutely" his idea to form a limited partnership for this venture. Tr. 795-796. Horne testified that he was made aware of the firm which prepared the formal partnership agreement (the Akerman law firm of Orlando, Florida) by Garrote, and that it was his decision to hire the Akerman firm.[12] Tr. 820-821. He further recalls that Wortham may have been using them as well. Tr. 863. Dawson testified that he knew of the Akerman law firm and had spoken with members of that firm relative to the Orlando radio station licensee of which his mother as well as a former co-worker (Ron Lavelle) and friend (Jose Oaks) -- had been part owners. Tr. 981, 8009-8010. Dawson knew that Wortham and Horne were using the Akerman firm to prepare limited partnership agreements. Tr. 1069. Nonetheless, Dawson professed not to know how the Akerman law firm came to be hired by Horne speculating that Horne might have heard of it from someone else. Tr. 1011.

67. Horne asserts that he consulted an attorney (Diane Kirigan) who has been his and his family's attorney for years concerning the limited partnership agreement. He states that Kirigan reviewed the agreement but did not want to get involved in FCC matters. Tr. 810-811. Horne asserts that his attorney made changes in the agreement before he signed the agreement. None of these changes were identified. Tr. 910-911. Horne also testified that he consulted another personal attorney, Ken Klein, relative to his "fact-finding" research of general manager and radio station music contracts. Tr. 810-811.

68. According to Horne, Thomas Hart, subsequently hired as Afro-American's co-counsel, was recommended by James Brown. Tr. 949. Horne claims that he did not recommend Hart to anyone, nor was he aware that Hart represents Wortham, Mrs. Dawson, and Oaks. *Id.*

69. With respect to the hiring of Afro-American's engineer, Lee Simmons, Horne testified that he was referred to Simmons by Wortham, not by Dawson. Tr. 862. Dawson states that he had in fact recommended Simmons to Wortham, but not Horne, but he acknowledged that he knew Simmons prior to the filing of Afro-American's application. Tr. 1015, 1049. Dawson claims no involvement in the hiring or retaining of Simmons on behalf of Afro-American, and further testified that he does not know why Simmons sent a statement for the preparation of Afro-American's engineering to Dawson's attention in care of Horne's stated Riviera Beach address. Tr. 1052-1053. Dawson does admit that he gave a check drawn on Dawson's personal account to Horne to send to Simmons for payment of an engineering retainer relative to Afro-American's application. Tr. 1056-1057, 1061-1062.

70. Horne further claims to have prepared Afro-American's proposed budget on his own (with the assistance of people he knows in the broadcast business and an equipment proposal obtained from Harris) -- using headings for the creation of the budget obtained, according to Horne, from consulting engineer John Mullaney's office via Garrote. Tr. 930-931. Horne testified that he did not recall speaking with or meeting Mullaney. *Id.* According to Horne, he merely provided Wortham with the headings he previously obtained from Mullaney through Garrote for the preparation of her budget and permitted her to use his computer at his office in the home he maintains on 40th Street in West Palm Beach -- during which times they did not discuss matters relating to the other's application, actual budget figures or budgetary considerations such as deferral of the general manager's salary. Tr. 848, 852-854. Horne claims he prepared Afro-American's budget in August 1989. Tr. 836.

71. Both Horne and Dawson testified that they executed the formal partnership agreement at the same time (on January 5, 1990), in the presence of "Mr. Dawson's notary public" in Boca Raton, Florida. Tr. 834-834, 1005-1009. Dawson acknowledged that he referred Wortham to the same notary public for execution of Minority Broadcasting Group Limited's formal limited partnership agreement and that he may have seen Wortham at the notary's office the same day both he and Horne executed the Afro-American

[12] Garrote apparently prepared the short partnership agreement dated September 14, 1989, the same day the Afro-American application was filed. Tr. 1005.

formal partnership agreement. Tr. 1007-1008. Wortham at that time worked in Fort Lauderdale and resided in Miami. Tr. 849, 1014.

72. Horne and Dawson both testified that the only thing they discuss relative to the application and partnership concerns the need for additional funds, which Horne requests Dawson to contribute in order to pay costs associated with Afro-American's application. Tr. 808-810, 887-888, 992-993. Dawson later admitted that other "major" matters have been discussed between them or of which he has been made aware. Tr. 994-995, 1026, 1135. However, he could only recall matters concerning the need to appear at the deposition and hearing sessions, and being made aware by Horne of Afro-American's ability to propose a 6 kW operation rather than a 3 kW operation. *Id.* Dawson recalls that he has received correspondence from Afro-American's communications counsel during the pendency of this proceeding but he could not specifically recall the nature of the correspondence because "they didn't impact on [him]." Tr. 1026-1027. When asked to explain what he meant by this testimony, Dawson testified that he did not know what the correspondence "impacted on" -- he just "knew" they did not impact on him because they were not something he could recall. Tr. 1027.

73. Afro-American's "Document Index" submitted in support of Afro-American's claims of attorney-client privilege and the work product doctrine, shows the subject matter of correspondence from counsel on which Dawson was copied. The "Document Index" shows as follows: (a) October 12, 1989 letter from Garrote to James Bacchus, local counsel for the applicant, copy to Dawson, containing Garrote's recommendations on the long form partnership agreement of the applicant; (b) January 2, 1990 letter from Garrote to Horne, copy to Dawson, containing legal advice concerning the partnership agreement and amendments as a matter of right; (c) December 15, 1989 memorandum from Garrote to Horne, copy to Dawson, advising on amendment as of right, integration statement, insulation criteria, public file, review of financial documentation and areas and population coverage; (d) June 7, 1991 memorandum from Garrote to Horne, copy to Dawson, regarding integration statement, settlement and discovery dates; (e) September 13, 1989 memorandums from Garrote to Horne and Dawson advising on draft partnership agreement and forwarding final application for final review; (f) October 2, 1989 letter from Garrote to Horne and Dawson providing advice on application back-up documentation and requesting Horne to send certificate of publication; (g) October 2, 1990 memorandum from Garrote to Horne, copy to Dawson, providing advice on application and public file maintenance procedures; (h) October 4, 1990 memorandum from Garrote to Horne, copy to Dawson, forwarding site assurance letter and providing advice on financial certification; (i) May 22, 1991 memorandum from Garrote to Horne, copy to Dawson, regarding designation for hearing, site issue raised in hearing desigantion order, and events triggered by hearing designation order; and (j) July 2, 1991 memorandum from Garrote to Horne, copy to Dawson, regarding pleadings received, discovery, procedural deadlines, deposition dates; settlement and document production.[13]

74. Horne claims that he has established and maintained the Afro-American public inspection file, arranged for the newspaper publications of the required public notices, and that he receives correspondence and invoices from FCC counsel on behalf of Afro-American. He further states that he is the sole signatory on the Afro-American partnership account which he established. Afro-American Ex. 2, pp. 9-10. Substantially all the funds (all but $2,300) deposited in by the Afro-American partnership account have been provided by Dawson following Horne's request to him that additional funds were needed to pay partnership bills. Tr. 817-820.

Diversification

75. Neither Afro-American, nor any principal of Afro-American (Dawson and Horne) have any other media interests. Horne has further promised to divest any attributable media interests he may acquire in the future if the application is granted. Afro-American Ex. 3.

Auxiliary Power

76. Afro-American proposes to provide auxiliary power generators at the studio and transmitter sites to provide continuous service in the event of a power failure. Afro-American Ex. 4, p. 1.

Marilyn Birk

Ownership Structure and Control

77. Birk is currently an individual applicant (Birk Ex. 1 at 1), but she would probably form a corporation to construct and operate the station. Tr. 1703.

Integration

78. In the event that her application is granted, Birk proposes to work full-time (forty or more hours per week) as general manager of the proposed station. In that capacity, she would be responsible for supervising, and setting policy for all areas of station operations including financial management and planning, personnel matters, programming and sales. Birk Ex. 1, p. 3.

79. Birk states she would terminate her present employment as Executive Vice President of Wodlinger International, Inc. and would also limit her involvement in any other activities, so as to enable her to devote a minimum of forty hours per week to the management of the proposed station. It is her present intent to retain her 9% equity ownership interest in Wodlinger International, Inc. and to continue as a member of the board of directors of that company; provided, however, that such activity does

[13] The "Document Index" was identified on the record as Triple J Ex. 10 but was not offered. The "Document Index" will be received and made part of the record by the Judge since it is relevant to whether Dawson has been insulated from active involvement in partnership affairs. In this connection, in its Reply filed April 27, 1992, Afro-American's counsel asserts that communications from counsel to Dawson concerned only such matters as appearances at depositions and hearings. See Pages 19-20.

not prevent her from effectuating her pledge to work forty or more hours per week at the proposed Jupiter station. Birk Ex. 1, pp. 3-4.

80. Birk has lived in Naples, Florida, since 1979. Tr. 1662. Birk proposes to move to Jupiter, Florida, if her application is granted, in order to work at the station. Birk Ex. 1, p. 4. She and Mark Wodlinger, also a Naples resident, have a personal relationship as well as a business relationship. Tr. 1677, 1682. They have been "good friends" since approximately March 1990. Tr. 1729-1730. Jupiter is approximately two hours' drive from Naples, Florida. Tr. 1677. If Birk moved to Jupiter, Florida, she would not go back to Naples on a regular basis. Instead, she said she would return only occasionally to visit her son. Tr. 1729.

81. Wodlinger, a man who has worked in the broadcast industry throughout his lifetime (Tr. 1675), told Marilyn Birk about the availability of the Jupiter, Florida channel. Birk Ex. 1, p. 1. Wodlinger thought Birk might be interested in the new FM channel, notwithstanding that she has never had any involvement with a domestic broadcast station. Tr. 1672-1673. Wodlinger recommended that Birk use. D.B. Communications as the engineering firm for her application. Birk Ex. 1, p. 1. He also recommended that Birk use his communications attorney, Michael Miller, as communications counsel for the application, which she did. Tr. 1673. Additionally, Wodlinger provided the name of the equipment supplier for Birk's Jupiter application. Tr. 1674.

82. In addition, when the time came to estimate costs for the proposed Jupiter station, Wodlinger reviewed with Birk cost figures for WIXI(FM), a station he had built in Naples, Florida. Tr. 1674-1675. Birk does not recall having seen a date on the cost estimates Wodlinger showed her for WIXI, nor does she know for certain when the station was built. She believes the station was built in 1986. Tr. 1720. Wodlinger only showed the WIXI(FM) cost estimates to Birk; he did not give her a copy of those documents. Tr. 1708. Birk took no notes when she was reviewing the financial information and she has not reduced to writing the budget for the proposed Jupiter station. Tr. 1718.

83. Birk alone obtained a bank letter to cover the costs of constructing and operating the proposed station. Also, she arranged for the agreement concerning the location of her transmitter site. In addition, Birk established a public file and caused newspaper publication of public notices concerning her application. Further, Birk with the assistance of counsel prepared her application in this proceeding. Birk Ex. 1, pp. 2-3.

84. Birk is an officer, director and shareholder of Wodlinger International (Tr. 1663), a company that participates in international communications ventures. Tr. 1680. Birk and Wodlinger conduct all of the business of Wodlinger International, including extensive foreign travel. Tr. 1682, 1665-1666. There are no other professional employees. Tr. 1682. Birk does not receive a salary, bonus or compensation of any sort for her work for the company. Tr. 1682. Instead, Wodlinger "gave" her nine percent of the stock of Wodlinger International, and he owns the remainder of the company's stock. Tr. 1682. Birk has never received any dividends on her Wodlinger International stock, nor has she been promised any future return on the stock. Tr. 1682-1683. If her Jupiter, Florida, application is granted, she will retain her position as director and maintain her ownership interest in Wodlinger International. Tr. 1664. She would monitor the business of Wodlinger International by telephone if her application were granted, but stated she would not have day-to-day responsibilities. Tr. 1664. There is not anyone employed at Wodlinger International prepared to take over Ms. Birk's duties if she left. Tr. 1665. Wodlinger International is headquartered in Naples, Florida. Tr. 1664.

85. Birk also is sole officer, sole director and 100% owner of Power Realty, a real estate sales brokerage. Tr. 1666, 1668. Initially, she worked at Power Realty for three years and then bought the company in 1989. Tr. 1679. Power Realty is Birk's sole source of income. Tr. 1683. Its offices are located in Naples, Florida (Tr. 1666), in the same building as Wodlinger International and WIXI(FM), the station that Wodlinger constructed. Tr. 1688. Birk will retain her ownership of and involvement with Power Realty if her Jupiter, Florida, application is granted (Tr. 1666, 1686), but she has not decided whether she will remain the sole officer and director of the company. Tr. 1667. Birk has spoken to her 23-year-old son, who also lives in Naples, Florida (Tr. 1667), about his helping with management of the company. Tr. 1667. However, her son is now employed as Vice President at The Clearinghouse Quarterly, a position that he has told his mother he would not give up in order to work at Power Realty. Tr. 1667, 1685. Instead, Birk claimed he would oversee the operations of Power Realty while maintaining his current employment. Tr. 1667. Birk's son is not licensed to sell real estate, nor is he a real estate broker. Tr. 1685. In Florida, a broker's license, which is more difficult to obtain than a real estate sales license, is required in order to close any real estate transaction. Tr. 1713-1714. Birk is the only broker at Power Realty. Tr. 1715. She plans to maintain her broker's license if her Jupiter, Florida, application is granted. Tr. 1714. According to Birk, it is not easy to get a Florida broker's license. Tr. 1717.

86. In addition to its real estate business, Power Realty has an authorization for an MMDS facility at Marco Island, Florida. Tr. 1668, 1671. As with her Jupiter, Florida, FM application, Birk filed the application for the Marco Island MMDS facility, together with several other MMDS applications that were rejected, at the suggestion of Mark Wodlinger. Although Birk has no other MMDS or microwave interests, Wodlinger has been active in wireless cable. Tr. 1671, 1692, 1694. The same engineers prepared the Marco Island MMDS application, the other MMDS applications that were rejected, and the Jupiter, Florida, application. Tr. 1694, 1724, 1671. The Marco Island MMDS application was granted in January 1991. Tr. 1711-1712. Birk has not begun construction of this facility (Tr. 1721), has no plans to construct it (Tr. 1669), and does not know what it will be used for. Tr. 1723. She stated that she never intended to use the MMDS authorization herself. Tr. 1694. Birk testified that, when the application was filed, she planned to sell or lease the facility to another entity to operate. Tr. 1693.

Diversification

87. Birk is the owner of Power Realty, Inc., licensee of a microwave radio station license for use in the Marco Island, Florida area. Birk is also the owner of a 9% equity interest in Wodlinger Broadcasting International, Inc. Wodlinger Broadcasting International, Inc. owns no interest in any medium of mass communications within the United

States. Neither Birk nor any member of her immediate family have any interest in any broadcast facility or other medium of mass communications. Birk Ex. 1, p. 5-6.

Auxiliary Power

88. In the event her application is granted, Birk will install and utilize auxiliary power generators at her studio and transmitter sites to ensure continuous operation during commercial power failure. Birk Ex. 1, p. 5.

Lighthouse Broadcasting, Inc.

Ownership Structure and Control

89. Lighthouse Broadcasting, Inc. (Lighthouse) is a corporation organized under the laws of the state of Florida. Patricia A. Larschan is the President, Treasurer, Secretary, sole director and sole stockholder of Lighthouse. Lighthouse Ex. 1 at 1. Lighthouse was formed for the purpose of applying for a new FM broadcast station in Jupiter, Florida, and has no other business activities. *Id.*

Integration

90. In the event that Lighthouse is awarded a construction permit for the new FM station in Jupiter, Florida, Larschan will resign from all employment positions and limit her involvement in other activities to the extent required in order to devote a minimum of forty (40) hours per week to her position as General Manager of the proposed station. In that capacity, Larschan will have primary responsibility for executing, planning and carrying out the organizational structure of the licensee. Larschan will be closely involved with recruiting and hiring key personnel in all areas of station operations. She will oversee the execution of duties by management personnel and their staffs, will advise and consult with the staff on matters relating to programming, sales, engineering and administration, and will operate as the ultimate decision-maker at the station. Lighthouse Ex. 2 at 1.

91. Larschan has resided at 3511 S.E. Fairway West, Stuart, Florida, within the 1 mv/m contour of the proposed station, since 1971, and will move to Jupiter, Florida, if Lighthouse is awarded the construction permit. Jupiter is approximately 16 miles from Stuart. Tr. 1174. From the fall of 1977 through the spring of 1979, Larschan attended college at Lake Worth, Florida, which is located outside the proposed station's service area. During that time, she retained her permanent residence within the proposed service area. Lighthouse Ex. 2 at 1-2.

92. Larschan has been involved in various civic activities in Martin County and Palm Beach County, both within the proposed station's service area. *Id.* at 2; Tr. 1248; Joint Ex. 1 at figure 1. The civic activities in which Larschan has been involved include the following: She has served on the Board of Directors of the Palm Beach Martin County March of Dimes for six years to present. She has been on the Steering committee of the Martin County March of Dimes project "Walkamerica," for eight years to present. In 1983 and 1988, she was on the Steering Committee of the "Bid for Bachelors" event to benefit the Martin County March of Dimes. Lighthouse Ex. 2 at 2. In 1989 and 1990, Larschan served on the Board of Directors of the Lyric Theatre in Stuart, Florida (Martin County), which finds and showcases local talent from throughout the proposed station's service area, for audiences that include service area residents. *Id.*; Tr. 1257. Since 1991, Larschan has been a director of the Martin County Council for the Arts and Chairman of the organization's Arts Information Committee. This council, an area "umbrella organization," serves 13 or 14 local art organizations (dance, theater, visual arts) throughout Martin County. Lighthouse Ex. 2 at 2, Tr. 1258. For the past four years, Larschan has been active on the Advisory Board of the Women's Center of Martin County, the only free-standing birthing and well woman's care facility of its kind on the Southeast Coast of Florida, serving women from Jupiter, Palm Beach County and Martin County. Lighthouse Ex. 2 at 2, Tr. 1258-1259. In 1989, Larschan was on the Board of Directors, Florida Oceanographic Society, an organization directing its efforts to protect the environment of the entire east coast of Florida, including coastal areas within the proposed station's service area. Lighthouse Ex. 2 at 2, Tr. 1259. For the past seven years, Larschan has been an Associate Member of the Martin County Fair Association and for the past five years, she has also been Advertising and Publicity Chairman for the Fair Association. The county fair is a community event that draws attendance from many east Florida counties, including Martin and Palm Beach Counties. Lighthouse Ex. 2 at 2, Tr. 1259-1260. In 1989 and 1990, Larschan was active in the Media Planning and Support Committee for Jensen Beach Pineapple Festival, benefiting the Jensen Beach Chamber of Commerce (Martin County). This "community pride" festival, which draws about 100,000 in attendance, spotlights local artisans and entertainers from area churches, schools and community groups, and gives charitable organizations an opportunity to recruit membership and to communicate with area residents. Numerous of the artisans, local organizations and attendees are from within Lighthouse's proposed service area. Lighthouse Ex. 2 at 2, Tr. 1261-1262. From 1986 to 1989, Larschan was involved with the Exchange Club of St. Lucie County as Media Liaison for Chili Cook-Off for prevention of child abuse. The Exchange Club generally, and this event in particular, supports the prevention of child abuse and related services for abused children (*e.g.*, counselling, housing) in several counties, including Martin County, within the proposed area. Lighthouse Ex. 2 at 2, Tr. 1177, 1230-1231. Other service area civic activities in which Larschan has been actively involved include: Event Planning Committee for Fundraising for Samaritan House for Boys, Martin County (1988); Planning Committee for Leadership, Martin County, sponsored by the Stuart/Martin County Chamber of Commerce (1990); Planning Committee for Media regarding the Sertoma Sailfish power boat races for charity, which are held in Martin County (1989-1991); Head of Steering Committee for Just Say No To Drugs Campaign for Martin County, including all public and private schools (1985-1989); and Media Representative for Sertoma Toys for Joy campaign benefiting underprivileged children in Martin County (1989-1991). Lighthouse Ex. 2 at 2-3.

93. Larschan claims broadcast experience. Starting in June 1979 to August 1979, Larschan worked as a receptionist for WSTU(AM), Stuart, Florida. Her duties included telephone reception, coordination of contests and prizes, typing for sales department and management. In September 1979, Larschan was promoted to Music Director for Station WSTU(AM), and worked in that position until January 1980. Her duties included complete responsibility for selection and execution of the station's music system and communications with record companies. From February 1980

to December 1980, Larschan worked as Traffic/Production Director for Station WSTU(AM). In that position, her duties included complete responsibility for logging commercials for the station. She also had production duties, which included copywriting and distribution of commercial copy to announcers. As head of the department, Larschan coordinated the activities of five announcers in addition to her production and commercial responsibilities. From January 1981 to August 1984, Larschan was Business Manager for Station WSTU(AM) and for then-startup station WHLG(FM), licensed to Jensen Beach, Florida. In that capacity, her duties included all bookkeeping responsibilities, billing, receivables, payables, and general ledger. From September 1984 to January 1988, Larschan was Assistant General Manager and Promotions Director for Stations WSTU(AM) and WHLG(FM). Her duties as Assistant General Manager included participation in daily managerial decisions for both stations in areas of programming, sales, engineering, and promotion. Lighthouse Ex. 2 at 4-5, Tr. 1247. Larschan has no authority to make managerial or hiring decisions independent of her mother, who is general manager. Tr. 1180-1181. Her Promotion Director duties included all development of the stations' on-air promotions and community event coordination, as well as public relations. Larschan coordinated the activities of six to eight people on a day-to-day basis. From March 1988 to present, Larschan has been Assistant General Manager and General Sales Manager for Stations WSTU(AM) and WHLG(FM). As Assistant General Manager, her duties are as described above. As General Sales Manager, her duties include oversight and direction of the Local Sales Manager and sales staff of five, as well as creation of all sales packages, rates, promotions, station goal settings, and sales budgets. Lighthouse Ex. 2 at 3-5. Larschan has overall responsibility for the Sales Department, and all sales staff and account representatives report to her. Tr. 1264-1266.

Diversification

94. Patricia A. Larschan owns 315 shares (32 percent) of HLG, Inc., licensee of WHLGL(FM), Jensen Beach, Florida, and 33 shares (3.3 percent) of WSTU, Inc., licensee of WSTU(AM), Stuart, Florida. As described above, Larschan is employed at WHLG(FM) and WSTU(AM) as General Sales Manager and Assistant General Manager. If Lighthouse's application is granted, Larschan will completely divest all of her interest in and connection with stations WHLG(FM) and WSTU(AM). Lighthouse Ex. 3 at 1, Tr. 1118-1119.

95. As unequivocally stated by Larschan during her hearing testimony, it has always been her intent to sever completely all ties with WHLG(FM) and WSTU(AM) if Lighthouse's application is granted. Tr. 1118-1119, 1220-1221. Before filing the Lighthouse application, she spoke at length with her then-counsel, who impressed on her that she would have to "close the door" and "could no longer have any connection with WSTU or WHLG" if Lighthouse's application were granted. Tr. 1118, 1220. Larschan candidly explained that she thought "very long and very hard" about the "major decision" to sever all connections with the station (Tr. 1119), emphasizing that it was "probably one of the most serious questions that [she] had faced in [her] life." Tr. 1221. She ultimately decided to commit to making a "complete break" with the stations if Lighthouse's application were granted. Tr. 1119. That commitment was stated in Lighthouse's "B cut-off date" amendment, which stated "[i]n the event that Lighthouse Broadcasting, Inc. is awarded a construction permit here . . . Patricia A. Larschan will terminate all her duties at both station WSTU(AM) and WHLG(FM)." Afro-American Ex. 10 at 3. This B cut-off amendment language also refers back to Exhibit 1 to Lighthouse's initial application, which plainly states, "[i]n the event that the Lighthouse Broadcasting, Inc. application is granted, Patricia A. Larschan will terminate her duties at both stations WSTU(AM) and WHLG(FM)." Afro-American Ex. 9 at 2. Since the time Larschan made this divestiture pledge, she has understood that if the Lighthouse application were granted, this commitment would prohibit her from having any involvement with the stations at all -- even discussing the stations' affairs with family members would not be allowed. Tr. 1221.

96. HLG, Inc. is controlled by Genevieve Glascock, Larschan's mother, who owns 50.5 percent of the company's stock. Lighthouse Ex. 3 at 1, Tr. 1204-1206, 1241. The majority of the stock of WSTU, Inc. is held in two trusts established at the time of Larschan's father's death in 1977. Lighthouse Ex. 3 at 1. Glascock controls WSTU(AM) through her corporate positions and her position as general manager. Tr. 1155, 1204-1206, 1241. It was discovered during Larschan's deposition in this proceeding, and fully explored at the hearing, that Larschan is included in various corporate records as an officer and/or director of HLG, Inc. and WSTU, Inc. Lighthouse Ex. 3 at 1, Tr. 1098. Although Larschan had no awareness of holding any such officer/director position,[14] Larschan repeatedly emphasized in her hearing testimony that she intended her divestiture pledge to encompass each and every position at both stations. Lighthouse Ex. 3 at 1, Tr. 1098, 1118-1119, 1220-1221.

Auxiliary Power

97. Lighthouse proposes to install auxiliary power equipment at the proposed station's studio and transmitter sites to insure continuous operation in the event of a power failure. Lighthouse Ex. 1 at 1.

Manuel Palau

Ownership Structure and Control

98. Manuel Palau is an individual applicant. Palau Ex. 1.

Integration

99. Palau proposes to work full time, at least forty hours per week, as general manager of his proposed station. Palau Ex. 3; Tr. 1626. In the event his application is granted, Palau will relinquish all other employment and move to Jupiter, Florida. Palau Ex. 3.

[14] Larschan has performed no duties as an officer or director of HLG, Inc. or WSTU, Inc. Tr. 1103, 1098. She has never attended meetings of the officers or directors of these companies; indeed, she does not know whether such meetings have taken place. Tr. 1182-1183. She has never held herself out in the community as an officer of director of either of these companies. Tr. 1109.

100. Palau is Hispanic. Palau Ex. 3. His mother was born in Puerto Rico. Tr. 1606. His father was born in Cuba. *Id.* Palau was raised in a home in which Spanish was the predominant language. Tr. 1607. Palau is fluent in Spanish. *Id.*

101. Palau is relying on a loan from Broadcast Capital Fund, Inc. (BROADCAP) to finance the construction and start-up operation of his proposed station. Tr. 1620-1621; Birk Ex.2. Palau understands that BROADCAP is a private, non-profit organization which invests in minority communications enterprises to provide a source of funds for minorities. Tr. 1619.

102. On September 12, 1989, Palau and his counsel met with BROADCAP's Kenneth Harris and Ray Suarez to discuss BROADCAP's willingness to loan funds to Palau for his Jupiter, Florida station. Tr. 1619-1620. As a result of that meeting, BROADCAP provided Palau with a letter, dated September 14, 1989, outlining the terms under which BROADCAP would be willing to make funds available to Palau for his intended purposes. Birk Ex. 2. The letter is signed by Kenneth O. Harris, Senior Vice President of BROADCAP. *Id.* The letter states that BROADCAP "would intend to calculate interest at twelve percent (12%) with a stock warrant interest of up to 30%." *Id.*

103. Palau testified that he was in agreement with the terms of the BROADCAP letter. Tr. 1622. Palau believes that as part of this agreement, BROADCAP has an option to acquire a warrant to acquire a stock interest in his station. Tr. 1622, 1640. Palau testified that the only way BROADCAP could obtain this interest would be for him to form a corporation. Tr. 1640. Palau did not discuss the nature of the stock warrant in the one meeting he had with BROADCAP officials. Tr. 1622. However, based on his discussions with BROADCAP, he was certain that any BROADCAP stock interest that eventuated as a result of the exercise of a warrant would be for non-voting stock and that BROADCAP's interest was merely in protecting their investment in the loan. Tr. 1640. At all times, it was understood that Palau would be the sole operator of the station and that he "would have all the say in terms of what happened at the station." Tr. 1641.

Diversification

104. Palau has no interest in any medium of mass communication. Palau Ex. 2.

Auxiliary Power

105. Palau proposes to install auxiliary power at the transmitter and studio to prevent service interruptions in the event of power loss. Palau Ex. 4.

Jupiter Radio Broadcasting, Inc.

Ownership Structure and Control

106. Jupiter Radio Broadcasting, Inc. (JRBI) is a corporation organized under the laws of the State of Florida. The sole shareholder of JRBI is Michael M. Tuchman, 72 Dunbar Road, Palm Beach Gardens, Florida. Tuchman is the President and sole Director of JRBI. Tuchman is a United States citizen. JRBI Ex. 1.

Integration

107. FCC Form 301 (June 1989), Section IV-B - "Integration Statement," Question 1, filed by JRBI, provides *inter alia* that the applicant "briefly describe the proposed position and duties" for each principal who proposes to participate in the management of the proposed facilities. In its amendment filed January 10, 1990, the B cut-off date, JRBI stated in response:

> "Michael Tuchman will integrate full time a minumum of 40 hours per week in the operation of Jupiter Radio's proposed station. He will terminate his present employment to devote full time to the management of the station." Tr. 271.[15]

JRBI's direct case states that Tuchman will serve as General Manager of the proposed station. JRBI Ex. 1, p. 1. The reference to Tuchman's serving as General Manager was objected to and stricken on the ground it constituted an impermissible upgrade. See Tr. 270-275. The language from JRBI's amended application, quoted above, was substituted in lieu of the language in JRBI's exhibit.

108. The Presiding Judge also struck the portion of JRBI Ex. 3 which stated: "Dr. Tuchman will be responsible for establishment, implementation and oversight of JRBI's Equal Employment Opportunity Program." The Judge did so on the assumption that such information was not included in JRBI's application.[16] JRBI's findings request official notice that the Form 396-A submitted with JRBI's application set forth such responsibilities for Dr. Tuchman. Official notice will be taken.[17] Also, the stricken portion will be received.

109. Tuchman has resided in Palm Beach Gardens, Florida, which is located within the proposed 3.16 mv/m contour of his proposed station, since January 10, 1990. *See* amended Exhibit 2 to JRBI's application herein, filed January 10, 1990.[18]

110. Tuchman has been involved in no civic activities within the proposed service area which would entitle Tuchman to qualitative enhancement credit for civic participation. *See* Tr. 279-285.

111. Tuchman is a Cuban-American. He was born November 17, 1948 in Havana, Cuba. He resided in Cuba until 1961. Tuchman became a naturalized United States Citizen on May 6, 1970. He is a practicing neurologist and

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[15] The competing applicants waived cross examination of Michael Tuchman. Tr. 286-287, 302.

[16] The transcript makes clear that JRBI's counsel did not make that claim at the time of the Judge's ruling. See Tr. 270-275.

[17] See Form 396-A, p. 4, submitted with JRBI's application.

[18] JRBI's direct case reflects that Tuchman resided in the service area prior to 1990. See JRBI Ex. 3, p. 2. However, JRBI's local residence credit was limited to 1990 since JRBI failed to include prior residences in its amended application filed January 10, 1990. *See* Tr. 277-278. Section IV-B- Question 2 specifically calls for a listing of past local residences and the corresponding dates.

psychiatrist. He will terminate his present employment to devote full-time to the management of the Jupiter radio station. JRBI Ex. 3, p. 1.

Diversification

112. Neither JRBI nor its sole shareholder, Michael J. Tuchman, have any ownership interest in any medium of mass communications. JRBI Ex. 2.

Auxiliary Power

113. JRBI will install auxiliary power facilities at both JRBI's studio and transmitter sites. JRBI Ex. 4.

CONCLUSIONS

Best Practicable Service

Comparative Coverage

114. Where, as here, areas are well served, the Commission has awarded slight coverage preferences to applicants proposing substantially greater overall coverage. *Simon Geller*, 90 FCC 2d 250, 268-269 (1982) (subsequent history omitted) (coverage superiority of four times more area and 315,000 more persons). For less significant differences, very slight preferences may be appropriate. *See Barton Broadcasting Co.*, 104 FCC 2d 785, 791 (Rev. Bd. 1986) (coverage difference of 44,215 or 27%); *Family Broadcasting Group*, 93 FCC 2d 771, 779 (Rev. Bd. 1983) (coverage differences of 42,000 persons or 8%, 140,000 persons or 34%, and 180,000 persons or 44%).

115. Lighthouse, Triple J, and Pelican propose to serve the largest number of persons. The differences in population to be covered by each of these three is not significant. Thus, no preference is warranted as to each other. Nevertheless, Lighthouse, Triple J and Pelican are each entitled to very slight preferences over Afro-American[19] and JRBI for coverage advantages ranging between 8.19% and 23.7%. These four applicants will also receive slight preferences over Intermart, Sun, Birk, and Palau, because they propose to serve between 35.2% and 63.7% more persons.

116. Afro-American's proposal warrants a very slight preference over JRBI, Intermart, and Sun, for total population advantages of between 7.94% and 27.1%. Afro-American receives slight preference over Birk and Palau, over which it enjoys population advantages of 30.2% and 42.9%. JRBI is entitled to a very slight preference over Intermart, Sun, and Birk, since it proposes to serve between 15.8% and 20.6% more persons. JRBI's 32.4% population advantage over Palau earns it a slight preference.

117. There is no cognizable difference in the proposals of Intermart, Sun, and Birk. No preferences are due these applicants *vis a vis* each other. All of them are entitled to a very slight preference over Palau, however, for advantage in total population ranging between 9.76% and 14.3%.

Integration

Quantitative

118. Sun receives 100% integration credit. Sun's sole principal, George Pine, proposes to serve as the full-time general manager of the proposed station. He has pledged to move to Florida to fulfill his commitment. No evidence has been proffered by Sun's opponents which provides the slightest basis for discrediting Pine's proposal. Also, it is argued that Sun should receive no integration credit because Sun's corporate documents authorize issuance of non voting stock and do not contain insulation provisions prohibiting prospective nonvoting stockholders from exercising significant influence or control over the corporation. Sun's opponents overlook the fact that Pine is the sole stockholder of Sun and, unlike the authorities cited, there are no other stockholders, voting or non-voting. Although the corporate articles authorize issuance of nonvoting stock, no nonvoting stock has ever been issued. Moreover, Pine testified -- without contradiction -- that he originally organized Sun with two classes of stock because he thought that there might be other investors, but that he subsequently decided to proceed alone and does not plan to have any investors in the future. Tr. 312-313. No evidence has been offered challenging the credibility or reliability of that testimony and 100% integration credit is awarded.

119. Triple J also receives 100% integration credit. The three principals will serve full-time in positions which are clearly management-level, policy-making positions recognized by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). The fact that Jordan, Triple J's 51% stockholder and general manager, will have ultimate decisionmaking authority does not diminish Imle's and Gostic's entitlement to integration credit. The fact remains that all three parties will be involved in management level and policy-making decisions. It is clear that the dominance of the majority stockholder does not preclude credit where, as here, Imle and Gostic play true and actual roles in management. See *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 (Rev. Bd. 1987); see also *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7272 (Rev. Bd. 1990). Moreover, there is no basis for the assertion that Imle's proposed integration commitment is not likely to be effectuated because she has not held an employment position since moving to Florida in 1980. Imle, who is 65 years old, has been extensively and continuously involved in community affairs for the past 12 years. There is nothing in the record suggesting that any health, lifestyle or other reasons to question Imle's ability or inclination to effectuate her integration proposal. The fact that Imle has not been employed since 1981, standing alone, does not make her integration proposal suspect. See *Eve Ackerman*, 7 FCC Rcd 2493, 2494 (Rev. Bd. 1992).

120. Also, contrary to the assertions of the parties, there is no basis to reduce Jordan's integration credit because she may engage in a maximum of 12 hours per week in nursing activities and has recently married a man who resides in the Tampa area, away from Jupiter. There is nothing inherently unreliable or incredible for a proposed integrated principal, like Jordan, effectuating a 52 hour

[19] Afro-American's June 20, 1991 population figure of 266,000 is less favorable than the figure reflected in its predesignation amendment as a matter of right. The June 20, 1991 population figure has been used since it best reflects the actual coverage the applicant will provide without unduly prejudicing the other applicants. See *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986).

work week, especially where all such work activities will take place in Jupiter. *Jared Broadcasting Co., Inc.*, 1 FCC Rcd 181, 189 (Rev. Bd. 1986). Further, notwithstanding her recent marriage, Jordan has pledged to reside in the community of license and no evidence has been proffered undercutting her adherence to that commitment. The fact that her spouse does not intend to move to Jupiter is not a basis for denying integration credit. See *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437 (Rev. Bd. 1990). Triple J is entitled to full integration credit.

121. Intermart does not seek and receives no quantitative credit.

122. Terry Moore, an individual applicant doing business as Pelican, is entitled to 100% integration credit. Mrs. Moore proposes to work at the station as the full-time general manager and plans to move to Jupiter to carry out her commitment. The record is barren of evidence that she is unwilling or unable to effectuate her integration proposal. Mrs. Moore's opponents argue that she should be denied integration credit because of the role played by her husband in the initiation and prosecution of her application. The contention is without support. Mrs. Moore's opponents ignore the fact that the proposal is financed solely by Mrs. Moore and no funds have been or will be provided by her husband. Moreover, the record makes plain that Mrs. Moore was involved and entirely in control of all aspects of her application. The fact that, at her behest, her husband, a radio engineer, rendered technical assistance is perfectly reasonable under the circumstances and does not belie Mrs. Moore's sole ownership and control over her application. See *Sound Broadcasting Co.*, 6 FCC Rcd 3626, 3628 (Rev. Bd. 1991). Absent a basis for finding that persons other than Mrs. Moore have an interest in the station, Mrs. Moore's integration proposal will be credited. See *Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd 7377, 7379 (Rev. Bd. 1991).

123. Afro-American seeks 100% integration credit based on its proposal to integrate Jimmy Horne, Jr. into the management of its proposed station. Afro-American claims that Horne is the sole controlling partner and that Kenneth Dawson is and will remain a passive owner. However, there is substantial evidence that Afro-American's depiction is neither truthful or accurate and that, in fact, Dawson, rather than Horne, exercises control over the applicant. Since Afro-American's integration proposal is unworthy of credence, no integration credit is awarded. See *Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991) and cases cited therein.

124. Dawson's dominant role becomes abundantly clear when the totality of the evidence is examined. Dawson's financial dominance, the circumstances surrounding the filing of the application, Dawson's role in the selection of legal and engineering counsel, and Dawson's post-formation involvement convincingly demonstrate Dawson's total control of the applicant.

125. Dawson, who holds a 70% equity interest is responsible for funding 99.26% of the Afro-American venture. He has committed to provide $312,000 including all prosecution costs. On the other hand, Horne, who holds a 30% equity interest, has only a nominal financial stake (00.74%) in the venture. Horne is only required to provide $2300. Although Horne asserts that his contribution was reached by "negotiations" with Dawson and on advice of counsel, the figure bears no relationship to Horne's equity interest. The record indicates that the figure represents all that Horne could afford. The clear financial dominance by which Dawson has and will continue to control Afro-American including being solely responsible for prosecution costs of the applicant coupled with Horne's paltry financial stake renders this applicant's integration proposal suspect.

126. The suspicious circumstances surrounding the filing of Afro-American's also cast substantial doubt on Afro-American's proposal. Dawson, assisted by his communications counsel, Nora Garrote, sought reallocation of the channel to Jupiter. Dawson promised that if the channel was allocated, he would apply and if authorized, he would build promptly. In a subsequent pleading, Dawson confirmed his intent to apply for the Jupiter station. Yet a scant 7 months later when the channel was allocated, Dawson had lost all interest. According to Dawson, his health had gotten worse and he wasn't certain he wanted to get back into broadcasting. Interestingly, Dawson's alleged health problems didn't prevent him from engaging in an active business association with Horne. Also, Dawson's alleged lack of enthusiasm for further involvement in broadcasting is difficult to reconcile with his agreement that very same month (June 1989) to apply for Jupiter in partnership with Horne. It is plain that Dawson was less than candid in explaining why he had not carried out his promised commitment to apply to Jupiter. The more likely reason was Dawson's realization that he would fare poorly in a contest for the channel.

127. It is also improbable, as asserted by Dawson and Horne, that Horne learned of the Jupiter allocation independent of Dawson. It must be remembered that Dawson and Horne were friends and business associates in 1988-1989 when Dawson was personally and extensively involved in the rulemaking proceeding. Thus, Dawson's testimony that he never told Horne about his involvement in the allocation process nor Ms. Garrote's legal assistance in that process at the time he and Horne discussed in June 1989 their joining together to file an application stretches credulity. It is reasonable to infer from the facts that contrary to the tale spun by Afro-American, Dawson, rather than Horne, was the prime mover in applying for Jupiter and the limited partnership arrangement was a strategem to conceal Dawson's true role.

128. Horne's choice of legal and engineering consultants casts further doubt on the validity of Afro-American's proposal. As discussed above, Garrote acted as Dawson's counsel when he filed the rulemaking petition for Jupiter. Notwithstanding, unbelievably, Dawson and Horne claim that Dawson was not involved in the selection of Garrote. According to Horne, he learned of Garrote through April Wortham (a former co-worker of Dawson and Horne), the general partner of a limited partnership applicant for a radio station in the nearby city of White City, Florida. Unsurprisingly, Wortham secured Garrote's name from Dawson. It defies reason to believe that Dawson would recommend Garrote to Wortham but would not impart that information to his partner in the Jupiter venture. What becomes apparent is that Dawson selected Afro-American's counsel and used Wortham as a "go-between" in an elaborate scheme to conceal Dawson's active involvement and perpetuate the myth of his passivity. Likewise, contrary to the testimony of Dawson and Horne, it is clear that Dawson selected Afro-American's local counsel and consulting engineer. Only Dawson had dealings with the Ackerman law firm and with Lee Simmons prior to the filing of Afro-American's application. As in the case of Garrote, Wortham was the "go-between" to signal the use

of Simmons. Aside from demonstrating Dawson's active participation, Horne's failure to make any effort to obtain his own consultants independent of Dawson speaks volumes as to the lack of truthfulness of Horne's asserted control of the applicant.

129. Finally, Dawson's on-going involvement in Afro-American's affairs removes any remaining doubt as to his pivotal role. Dawson recalls receiving correspondence from communications counsel. Dawson claimed he could not recall the nature of the correspondence because it did not "impact" him. His reasoning that the correspondence did not impact him was because they were not something he could recall. The contents of the correspondence were not revealed on privilege and work product grounds which were not contested by the parties. However, the "Document Index" submitted in support of Afro-American's privilege claim sheds light on the subject matter of such correspondence. The Index reveals that it covered the full panoply of matters ordinarily reserved for a general partner, not a limited partner. Thus, the Index reveals that Dawson was apprised of such matters as the partnership agreement, amendments as a matter of right, integration statement, insulation criteria, public file maintenance, financial documentation and certification, area and population coverage, publication procedures, site assurance, and the site issue raised in the hearing designation order. Coupled with the other indicia of Dawson's control over the applicant's affairs, discussed in the preceding paragraphs, it is plain that Horne, the nominal general partner, will not control the licensee as Afro-American has attempted to represent. Accordingly, Afro-American's integration proposal is unworthy of credence and integration credit is denied. *Coast TV*, 5 FCC Rcd 2751 (1990); *Fresno FM*, supra.

130. Marilyn Birk seeks 100% integration credit. The parties urge that Ms. Birk should be denied integration credit because of the assistance provided by Mark Wodlinger, with whom Ms. Birk has a close personal relationship as well as a business relationship. The contention is rejected. Wodlinger is not providing any funds to Ms. Birk, an individual applicant, and there is no evidence in the record indicating that anyone other than Ms. Birk has an ownership interest in the applicant or will be in a position to control the operation of the station. See *Oliver Kelley And Mary Kelley*, 6 FCC Rcd 7377, 7379 (Rev. Bd. 1991). Integration credit is denied, however, for a different reason. To sustain a claim of credit for full-time integration, an applicant planning to retain outside businesses "must set forth a specific and credible plan explaining how the principal in question would arrange for the businesses to be managed while fulfilling his integration commitment." *Kevin Potter*, 7 FCC Rcd 4342, 4342 (1992). Birk has failed to satisfy the Commission's requirements. Ms. Birk is the 100% owner of a real estate business located in Naples, Florida. The business is her sole source of income. Ms. Birk intends to retain her ownership interest and continue to be involved in the real estate business. She has made no realistic plans for the management of the business in her absence. Ms. Birk has spoken to her son who also lives in Naples about his helping with management of the company. However, her 23 year son is unwilling to give up his full-time job to work in the real estate business. Her claim that he will oversee the real estate operation while maintaining his current employment is not credible. No specifies have been provided as to how this will be accomplished. Moreover, Ms. Birk's son is not licensed to sell real estate and does not have a broker's license necessary to oversee the business. In this connection, Ms. Birk intends to keep her broker's license. In the absence of a specific and credible plan for the management of her real estate business, integration credit is denied.

131. Lighthouse is entitled to 100% integration credit. Patricia Larschan, the sole principal of Lighthouse, will serve as full-time general manager of the proposed station. No evidence has been offered undercutting her entitlement to integration credit.

132. Manuel Palau is also entitled to 100% integration credit. Palau proposes to work full-time as general manager of the proposed station and there is no evidence that Palau will not be able to implement his commitment. Palau's opponents argue that Palau's quantitative integration commitment should be reduced to 70% because BROADCAP's commitment letter provides for a stock warrant interest of up to 30%. Convertible interests do not affect the ownership integration analysis unless there appears to be a likelihood that the interests will be converted. *Barry Skidelsky*, 7 FCC Rcd 1, 3 (Rev. Bd. 1992). Even assuming BROADCAP exercised its warrant, there is every reason to believe that the stock it would hold would be nonvoting stock since, as testified by Palau, in providing funds for minorities, BROADCAP's interest was in protecting their investment in the loan. Tr. 1619, 1640. In this connection, it was understood in his discussions with BROADCAP, that Palau would be the sole owner-operator and that (consistent with the function of MESBIC's in general), BROADCAP would have nothing other than investment interest. Tr. 1641. In the absence of evidence rebutting Palau's testimony, his integration commitment is full credited.

133. JRBI seeks 100% credit for the proposed integration on a full time basis of Michael M. Tuchman, JRBI's sole shareholder, President and sole Director. JRBI's opponents assert that no integration credit is warranted in light of JRBI's failure to include in its application the proposed position and duties of Tuchman. Integration credit will be awarded. Unlike the cases cited by the parties involving multiple owners, Tuchman is an individual applicant. Since Tuchman has pledged full time integration into the management of the station, there is no issue of non-managerial roles or functions which would distract from his role in the management of the station. Also, unlike the cited cases, there is no issue of defining roles and functions of multiple owners. What counts for purposes of determining integration credit is who will actually manage and supervise the overall operation of the station. Here, where Tuchman is the sole principal, there can be no doubt that his full-time integration pledge means that he will manage and supervise the station, whether or not he has the functional title of "General Manager." See *Sarasota-Charlotte Broadcasting Corp.*, 976 F.2d 1439 (D.C. Cir. 1992). Consequently, JRBI's failure to specify Tuchman's position in the application is not fatal under the facts of this case and integration credit is awarded. Also, there is no merit to the contention that integration credit should be denied in the absence of an additional showing demonstrating the reliability of Tuchman's statement that he will terminate his medical practice to fulfill his integration commitment. Tuchman has made an unconditional, unequivocal commitment to terminate his practice. Absent some basis for doubt his sworn commitment must be credited. See *Bradley*

Hand & Triplett, 89 FCC 2d 657 (Rev. Bd. 1982); see also *Charisma Broadcasting Corporation,* FCC 92-563, released February 9, 1993, paragraphs 8 and 9.[20]

Qualitative

134. Sun, Triple J, Pelican, Lighthouse, Palau and JRBI have received 100% integration credit and their qualitative attributes require analysis.[21] Sun and Pelican are qualitatively inferior to the other applicants. Their only attributes are their intent to move to Jupiter (in the case of Pelican's principal, Terry Moore) and the service area (in the case of Sun's principal, George Pine) plus limited broadcast experience. In this connection, Pine's maintaining of a condominium apartment in North Palm Beach and his brief visits there is of *de minimis* importance. The fact remains he lives and works in New York City and is not involved in any civic activities in Florida.

135. Of the remaining applicants, Triple J offers the following: Sandra Corr Jordan (51% stockholder) resident in contiguous community since 1983 and Jupiter resident since December 1987 plus civic and community involvement; Elena F. Gostic (24.5% stockholder), minority credit, resident of Jupiter from 1980-1988, resident of service area from September 1988 to March 1989 and resident since that time in contiguous community plus civic and community involvement; and Mary M. Imle, (24.5% stockholder) resident of Jupiter since 1980 plus civic and community involvement. Lighthouse's principal, Patricia A. Larschan has resided in the service area since 1971, has been active in civic and community affairs and has broadcast experience including managerial responsibilities. She also proposes to move to Jupiter if her application is granted. Manuel Palau receives 100% minority credit and proposes to move to Jupiter if his application is granted. Finally, JRBI's principal, Michael Tuchman receives 100% minority credit and receives credit for his service area residence since January 10, 1990.

136. Although close, Triple J's qualitative enhancement is superior to that of the other applicants. Triple J enjoys an edge over Lighthouse under the unified local residence-civic activity criterion. While Lighthouse's principal, Larschan, has longer residence in the service area, Triple J's principals have residence of considerable duration in Jupiter and the contiguous community of Tequesta. Further, their civic involvement is centered for the most part in Jupiter while Larschan's civic activities do not involve Jupiter directly and a number of these activities are only tangentially related to the service area. Triple J's entitlement to 24.5% minority enhancement further tips the scale for Triple J. Larschan's broadcast experience does not outweigh this advantage. Triple J's local residence and civic involvement combined with its 24.5% minority enhancement also prevails over Palau's substantial minority enhancement and proposed future residence and JRBI's substantial minority enhancement and service area residence since January 1990 (the filing of its amended application).

Auxiliary Power

137. With the exception of InterMart, all the applicants propose auxiliary power and are accorded slight credit for their proposals.

Diversification

138. InterMart receives moderate to substantial diversification demerit based on the other media interests held by its principals. Birk receives a slight demerit based on the license for the MMDS system in nearby Marco Island held by a company owned by Ms. Birk. None of the other applicants receive a diversification demerit. In this connection, Larschan made an all-encompassing pre-B cut-off divestiture pledge. The record establishes her consistent intent to divest completely any attributable media interests. Under these circumstances, her unintentional failure to specifically include a positional interest in that pledge is of no consequence and no diversification demerit is warranted. See *Naguabo Broadcasting Co.,* 7 FCC Rcd 1696 (1992).

Comparative Summary

139. For the reasons discussed above, Triple J enjoys an integration advantage over the other applicants. In addition, under the comparative coverage criterion, Triple J along with Lighthouse and Pelican propose to serve the largest number of persons and no preference is warranted as among them. Further, Triple J suffers no diversification demerit. Therefore, Triple J is the comparative winner. JRBI is ranked second. Its substantial minority ownership plus current local residence is deemed superior to Lighthouse's qualitative enhancement proposal plus its very slight comparative coverage preference. Lighthouse is ranked third and Palau fourth.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[22] the application of Triple J Properties, Inc. for a construction permit for a New FM Station on Channel 288A in Jupiter, Florida IS GRANTED;[23] and the applications of Sun Over Jupiter Broadcasting, Inc., InterMart Broadcasting Of Palm Beach, Inc., Terry D. Moore d/b/a Pelican Broadcasting, Afro-

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[20] As noted in the findings, the competing applicants were afforded an opportunity but waived cross examination of Tuchman.

[21] Afro-American and Birk have been given no integration credit. InterMart has not sought integration credit. It is, therefore, unnecessary to review the qualitative enhancements, if any, of these applicants. See *Van Buren Community Service Broadcasters, Inc.,* 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). Assuming qualitative enhancement was considered, Afro-American's proposed substantial minority ownership, local residence-civic involvement and broadcast experience is superior to that of the other applicants. Birk's enhancement consisting solely of her proposal to move to Jupiter is qualitatively inferior to that of the applicants receiving integration credit.

[22] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[23] Paragraph 32 of the HDO required that any grant be conditioned on FM station WQOL commencing program test authority and receiving a license to operate on Channel 279C2. The condition is moot since WQOL has received the necessary authorization.

American Broadcasters Limited, Marilyn Birk, Lighthouse Broadcasting, Inc., Manuel Palau and Jupiter Radio Broadcasting, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal No. 697
Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 557
BellSouth Telecommunications, Inc. Revisions to Tariff F.C.C. No. 1	Transmittal No. 92
Cincinnati Bell Telephone Company Revisions to Tariff F.C.C. No. 35	Transmittal No. 620
Centel Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 217
GTE System Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 34
GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 771
Lincoln Tel. and Tel. Company Revisions to Tariff F.C.C. No. 3	Transmittal No. 64
Nevada Bell Revisions to Tariff F.C.C. No. 1	Transmittal No. 153
NYNEX Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 165
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1613
Rochester Telephone Corporation Revisions to Tariff F.C.C. No. 1	Transmittal No. 183
Southern New England Tel. Co. Revisions to Tariff F.C.C. No. 39	Transmittal No. 555
Southwestern Bell Telephone Co. Revisions to Tariff F.C.C. No. 73	Transmittal No. 2260
United Telephone Companies Revisions to Tariff F.C.C. No. 5	Transmittal No. 315
US West Communications Revisions to Tariff F.C.C. No. 1	Transmittal No. 331

ORDER

Adopted: March 24, 1993; Released: March 25, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 15, 1993, petitions to reject or suspend the above-referenced tariffs were filed. Also filed on that date were oppositions to the petitions for exemption from or waiver of the physical collocation requirement established in CC Docket No. 91-141. Replies to both the petitions to reject or suspend, and to the oppositions to the exemption or waiver petitions, are due on March 29, 1993.

2. On March 22, 1993, US West Communications, Pacific Bell, and Nevada Bell jointly filed a motion for extension of time, requesting that the Commission extend the deadline for filing replies to the petitions to reject or suspend the above-referenced tariffs until April 16, 1993. The parties state that this additional time is necessary because the number of petitioners in this proceeding is greater than usual; some of the petitions are fairly voluminous; and the replies to the oppositions to the petitions for exemption from or waiver of the Commission's physical collocation requirement are also due on March 29, 1993. In addition, US West states that its primary counsel for these matters will be out of the office until March 29, 1993, and that a number of key personnel involved in this matter are also involved in two other tariff proceedings with similar deadlines.

3. The Division has reviewed the petitioners' request for extension of time and has determined that good cause has been shown to grant all interested parties some additional time to file replies to the petitions to reject or suspend the above-referenced tariffs. We do not, however, believe that petitioners have justified an extension of time until April 16, 1993. Therefore, we will extend the deadline for filing replies to April 5, 1993. Further, the Division, on its own motion, will extend as well the deadline for filing replies to the oppositions to the petitions for exemption or waiver until April 5, 1993.

4. Accordingly, IT IS ORDERED that the motion for extension of time filed by US West Communications, Pacific Bell, and Nevada Bell IS GRANTED to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Tier 1 Local Exchange Carriers'
Zone Density Pricing Plans

ORDER

Adopted: March 25, 1993; Released: March 26, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 22, 1993 ten Tier 1 local exchange carriers (LECs) filed a joint motion for extension of time (Joint Motion) to file replies to comments concerning their zone density pricing plans.[1] Comments concerning the plans may be filed not later than March 26, 1993. Reply comments are currently due April 2, 1993. The Common Carrier Bureau established these deadlines in order to ensure that it would be able to act on the LECs' zone density plans as expeditiously as possible.[2]

2. The Joint Motion argues that a two week extension of time for the LECs to file reply comments is necessary to ensure a fair opportunity to respond to opposing parties. The Joint Motion also contends that this extension of time should not cause material delay in the actual effective date of any LEC's zone density pricing plan. The Joint Motion therefore requests that we extend the deadline for filing reply comments in this proceeding to April 16.

3. We conclude that no party will be prejudiced by granting the requested extension of time and that the public interest will be best served by allowing additional time for the development of a complete record. Therefore, we will extend the deadline for submission of reply comments concerning the LECs' zone density pricing plans to April 16, 1993 as requested by the Joint Motion.[3]

4. Accordingly, IT IS ORDERED that the Joint Motion for Extension of Time filed by the Tier 1 local exchange carriers IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] The LECs requesting the extension of time are the Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., Central Telephone Company, GTE Service Corporation, New York Telephone Company and New England Telephone and Telegraph Company, Pacific Bell, Rochester Telephone Corporation, Southwestern Bell Telephone Company, United Telephone Companies, and U S West Communications, Inc.

[2] *See Public Notice*, Common Carrier Bureau Requests Further Information Concerning Zone Density Pricing Plans; Extends Comment Dates, DA 93-290, (released March 10, 1993).

[3] This revised deadline applies to all interested parties and not only to the ten LECs that filed the Joint Motion. No further extensions of time are contemplated.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 24, 1993

MCI files Petition for Cease and Desist Order and Elaboration of Fresh Look Rule

Pleading Cycle Established

Comments: April 23, 1993
Reply Comments: May 25, 1993

On March 8, 1993, MCI Telecommunications Corporation (MCI) petitioned the Commission, among other things, to enter a cease and desist order directing the American Telephone and Telegraph Company (AT&T) "to cease from engaging in unlawful and inappropriate market practices intended to confuse consumers and injure competition."

MCI alleges that AT&T has embarked on a deliberate course of action to disparage its competition and confuse and intimidate consumers into foregoing their opportunity to migrate their business away from AT&T. MCI asserts that AT&T's conduct is a violation of Section 201(b) of the Communications Act and warrants the immediate grant of the relief requested.

Interested parties should file comments regarding MCI's petition no later than April 23, 1993. Reply comments should be filed no later than May 25, 1993.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with 1993 Annual
Access Tariffs

Petitions for Waivers

ORDER

Adopted: March 19, 1993; Released: March 19, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 18, 1993, this Bureau released an order in the above-captioned proceeding that established Tariff Review Plans (TRPs) for annual access tariff filings to be made by local exchange carriers (LECs) on April 2, 1993.[1] The *1993 TRP Order* provided TRP formats, described changes from previous TRPs, and set a schedule for the proceeding. The filing date for petitions for waiver concerning TRPs was set for February 25, 1993. The filing date for replies to waiver requests was set for March 3, 1993.

2. Petitions for waivers were filed by US West Communications Corporation (US West), Lincoln Telephone Company (Lincoln), Minnesota Independent Equal Access Corporation (Minnesota), South Dakota Network, Inc. (SDN), Rochester Telephone Corporation (Rochester), and Vista Telephone Company of Iowa (Vista). In addition, GVNW, Inc. (GVNW) applied for Special Permission to exempt Home Telephone Company and Madison Telephone Company from the 1993 annual filing requirements.[2] Replies to petitions were filed by the Bell Atlantic Telephone Companies (Bell Atlantic) and the United States Telephone Association (USTA). In this Order, the Bureau addresses these pleadings and provides procedures to be followed in making this year's annual access tariff filings.[3]

II. DISCUSSION

A. US West

3. US West, on behalf of itself and all price cap LECs, asks for a waiver of the Commission's Rules in order to re-allocate General Services Facilities (GSF) costs to common line, and to lower price cap indexes for services from which GSF has been removed. First, US West states that § 69.307 of the Commission's Rules over-allocates GSF to special access and traffic sensitive, and under-allocates this expense to common line.[4] US West argues that a pending rulemaking to modify § 69.307 and correct this situation was endorsed by virtually all parties filing comments in that rulemaking proceeding.[5] Second, US West requests a waiver of § 61.45(d) of the Commission's Rules in order to reflect resulting reallocations of GSF as exogenous cost changes.[6] US West Petition at 4-5.[7] Bell Atlantic and USTA, supporting US West, argue that grant of the waivers would facilitate more rational pricing for both special and switched access services without compromising public policy goals. Bell Atlantic Reply at 1-2 and USTA Reply at 1-3.

4. US West also asks the Commission to clarify the calculation of the GNP-PI factor for 4th Quarter 1991 used in the PCI formula. US West maintains that instead of applying the March 1993 version, published by the US Department of Commerce, the 1992 version should be used. The versions differ because the United States Department of Commerce revised GNP-PI in July 1992. US West Petition at 2-4.

5. The re-allocation of GSF costs requested by US West is the subject of a pending rulemaking. US West makes no showing that advanced implementation of the proposed rule in its service area (or generally) is in the public interest, or that any unique circumstances exist that would support grant of a waiver. Therefore, we find that US West has not demonstrated good cause for such action.

6. US West also asks for clarification of the correct computation of the GNP-PI factor for 4th Quarter 1991 in the PCI formula. US West recommends the use of the March 1992 version, published by the United States Department of Commerce, instead of the March 1993 version. In response to US West's request for clarification, the March 1993 version of GNP-PI should be used.[8] The Commission has required LECs to use the most recent version available of the GNP-PI time series, and companies have used the latest version in all past annual filings.[9] It is important to use the same published version for 4th Quarter 1991 as with 4th Quarter 1992, because the United States Department of Commerce revises the GNP-PI time series on an annual basis. In July 1992, the GNP-PI time

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[1] Commission Requirements for Cost Support Material To Be Filed with 1993 Annual Access Tariffs, DA 93-192, released February 18, 1993 (Com. Car. Bur.) (*1993 TRP Order*).

[2] GVNW, Inc., Application No. 35, filed February 3, 1993.

[3] We also add two minor notes regarding the *1993 TRP Order*. First, price cap LECs with more than one rate element to report in the rate comparison chart in Attachment A, Chart RTE-1, Row 180, may enter "N/A" in Row 180 in columns titled (1) Base Period Demand, (2) Rates at Last PCI Update, (3) Current Rates, and (4) Proposed Rates. Second, in paragraph 40 of the *1993 TRP Order*, the April 2, 1993 date should not be construed to refer to the 4th Quarter 1992 ARMIS Report 43-01, which is due March 31, 1993. This reference only requires Chart COS-1(H) in Attachment B to be filed by Tier 1 rate of return companies.

[4] 47 C.F.R. § 69.307.

[5] Expanded Interconnection With Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992).

[6] 47 C.F.R. § 61.45(d).

[7] US West also filed a letter concerning this issue, dated March 12, 1993.

[8] United States Department of Commerce, *Survey of Current Business*, March 1993 Edition.

[9] *See* Policy and Rules Regarding Rates for Dominant Carriers, CC Docket 87-313, Second Report and Order, 5 FCC Rcd 6786, para. 50 (1990).

series was revised for the period from 1st Quarter 1989 through 1st Quarter 1992. Therefore, the March 1992 published version would be inconsistent with the March 1993 version, because the time series has changed.

B. Lincoln

7. Lincoln states that the company will elect price cap regulation effective July 1, 1993. Lincoln requests that the Bureau allow the company to initialize all price cap indexes to correspond to costs and rates as of May 1, 1993, instead of January 1, 1993 as required by the Commission's Rules.[10] Lincoln states that the waiver is necessary to place rates for 800 Data Base service, which were filed with an effective date of May 1, 1993, into price caps at cost based rates.[11] Lincoln Petition at 1-2.

8. Lincoln has demonstrated good cause for grant of the waiver requested. It is our understanding that Lincoln's May 1, 1993 rates will differ from January 1, 1993 rates only in that 800 Data Base service will have been introduced. Since 800 Data Base rates are scheduled to become effective before the annual access rates, these rates will have been cost supported under § 61.38 of the Commission's Rules.[12] Therefore, the Bureau grants the waiver, subject to the Bureau's review of these rates filed by Lincoln. The initial price cap indexes and rates must ultimately reflect the outcome of that review.

C. Minnesota, SDN, and GVNW

9. Minnesota, SDN, and GVNW each request a waiver of the annual access tariff filing for this year. Minnesota, a centralized equal access provider, states that it has only limited historical data on which to revise rates. Minnesota requests, alternatively, waiver of certain requirements of the TRP; specifically, the period used to measure historical cost (PYCOS year),[13] the period over which costs are projected (test year),[14] and the TRP format set forth for Tier 2 companies. According to the petition, June 1992 was the first month of full operation for Minnesota, and data are therefore unavailable for the full PYCOS year. Minnesota argues that use of these limited PYCOS data would make test year projections unreliable.

10. If Minnesota is required to make a filing, the company states it would use October 1, 1992 through December 31, 1992 as historical data and January 1, 1993 through September 30, 1993 as the test year. This period coincides with Minnesota's 1993 fiscal year and the study period filed in a pending Minnesota Public Utilities Commission rate case. In addition, Minnesota would use the cost support format employed in the company's initial interstate filing. Minnesota argues that the TRP format was designed for carriers providing a full range of interstate access services, and does not accommodate companies providing only centralized equal access service such as Minnesota. Finally, Minnesota cites a need to minimize burdens during the company's start up period. Minnesota Petition at 1-7 and Attachment.

11. SDN, a centralized equal access provider, also requests a waiver of the annual access tariff filing for this year, because of limited historical data on which to base rates. SDN states that the company has been fully operational for less than seven months and that none of its financial results have been audited. SDN requests in the alternative, if required to file, that the PYCOS year reflect annualized data from September 1992 through December 1992, the period for which data are available. In addition, SDN asks the Commission for a waiver to modify or leave unreported certain data in TRP charts for Tier 2 companies that are either unavailable or inapplicable. SDN Petition at 1-5.

12. GVNW, a private entity that files rates on behalf of client LECs, requests a waiver of the annual access filing for this year for two issuing carriers. The waiver would allow the rates for Home Telephone Company, that went into effect on December 1, 1992, and Madison Telephone Company, that went into effect March 1, 1993, to remain effective.[15] Neither company anticipates changes to the cost and demand data that would warrant a rate change at this time. GVNW notes that similar waivers were granted to two GVNW issuing carriers in the 1991 Waiver Order.[16] GVNW Application at 1.

13. Minnesota has not demonstrated good cause for exemption from the annual access filing and we deny its request for waiver. Minnesota's initial tariff was filed over a year ago and the public interest would be served by the filing of revisions with updated rates and cost support materials. Furthermore, Minnesota has sufficient cost and demand data to support rate revisions. However, the Bureau recognizes that Minnesota requires a waiver of the PYCOS period. Moveover, the TRP format is not fashioned for Minnesota in light of the fact that it is a centralized equal access provider rather than a LEC. Therefore, we grant Minnesota waivers to use the PYCOS period and cost support proposed in Minnesota's petition.

14. For the same reason, we deny SDN's waiver request for exemption from this year's annual access filing. Similar to Minnesota, SDN's initial tariff was filed over a year ago and SDN has sufficient cost and demand data to support rate revisions. We recognize that a waiver of the PYCOS period is necessary and that the TRP format is not fashioned for SDN because of its position as a centralized equal access provider. Therefore, we grant SDN waivers to use the PYCOS period and cost support proposed in SDN's petition.

15. The Bureau grants the waivers requested by GVNW on behalf of Home Telephone Company and Madison Telephone Company. We believe it would be unnecessarily burdensome to require the annual access filing this year, given the recent tariff filings of these companies.

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[10] 47 C.F.R. § 61.48(d)(2).

[11] *See* Provision of Access for 800 Service, CC Docket No. 86-10, FCC 93-53 (released January 29, 1993); Memorandum Opinion and Order, DA 93-202 (released February 22, 1993).

[12] 47 C.F.R. § 61.38.

[13] The past year cost of service (PYCOS year) period in this proceeding is calendar year 1992.

[14] The test year is July 1, 1993 through June 30, 1994.

[15] GVNW Transmittals Nos. 64 and 70, adding Home Telephone Company and Madison Telephone Company, respectively, as issuing GVNW carriers.

[16] Commission Requirements for Cost support Material to be Filed With Annual Access Tariffs, 6 FCC Rcd No. 6, released March 13, 1991 *1991 Waiver Order)*.

D. Rochester and Vista

16. Rochester and Vista, a subsidiary of Rochester, request certain waivers that have been granted in previous annual access filings. Rochester requests waivers to allow it to: (1) maintain the Special Access surcharge at $25; (2) establish and maintain an information surcharge rate element; (3) establish and maintain a local transport rate element that combines dedicated and common transport costs; and (4) maintain a local transport rate that does not vary with distance. Vista states that it will again require waivers to permit Vista to: (1) decline to offer WATS access lines with originating Feature Group A and Feature Group B service; (2) utilize a period other than eight years to amortize non-capital equal access conversion costs; (3) utilize an option other than the single bill option in the provision of access services jointly provided by two or more exchange carriers; (4) maintain the special access surcharge at $25; (5) maintain an information surcharge rate element; and (6) maintain a local transport rate element that combines dedicated and common transport costs.

17. In addition, Rochester and Vista request a waiver of TRP reporting requirements regarding zone density plans for price cap companies. The companies maintain that neither expects to have tariffs in effect for zone density plans until after July 1, 1993, the effective date of the annual access filings.

18. The waivers requested by Rochester and Vista were previously granted as continuing waivers for Rochester and subsidiaries such as Vista.[17] There is no need to renew a continuing waiver on an annual basis. Therefore, these waivers did not have to be filed and we dismiss these requests as moot. In addition, the Bureau does not believe a waiver is necessary in order to accommodate zone density plans. Companies which do not have zone density plans in place should enter zeros in the chart entries for zone density plans.

E. Filing Procedures

19. The attachment to this Order contains a description of the procedures to be used to file the annual access tariff filings.

III. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED that the waiver requests of the above-referenced local exchange carriers ARE GRANTED to the extent discussed herein, and ARE OTHERWISE DISMISSED OR DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[17] *1991 Waiver Order*, para. 9.

ATTACHMENT

PROCEDURES FOR 1993 ANNUAL ACCESS TARIFFS
TO BE FILED ON OR BEFORE APRIL 2, 1993

Local exchange carriers (LECs) are required by Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to file new access charge tariffs or revisions to existing tariffs to be effective July 1, 1993 on not less than 90 days' notice. Therefore, the Common Carrier Bureau anticipates receiving these filings on or before April 2, 1993. In this Attachment, we provide details on the specific procedures to be followed when submitting these filings to the Commission.

GENERAL

Interested parties are reminded that these filings and the associated review and analysis are not part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should not bear any docket number but should instead bear the designation "1993 ANNUAL ACCESS TARIFF FILINGS." All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's Commercial Contractor, International Transcription Service (ITS), Room 246, 1919 M Street, N.W.

TARIFF FILINGS

LECs submitting tariff filings should consult the attached schedule which details the number of copies required and the location to which those copies should be delivered. Carriers are especially reminded that (1) the tariff filing fee of $490 must be submitted to Mellon Bank, and (2) they must serve a copy on ITS. Those annual access filings submitted on April 2, 1993 must be delivered to ITS at the Commission in Room 535, 1919 M Street, N.W.

Carriers, whether filing their own individual tariffs or not, are reminded of the customer notification requirements as outlined in Section 61.58(a)(4) of the Commission's Rules, 47 C.F.R. § 61.58 (a)(4), concerning rate increases in particular. Carriers are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

In an effort to facilitate identification and cataloguing of the tariff filings, the LECs should:

1. Clearly label any package of revised tariff pages as such, e.g., BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, REVISED TARIFF PAGES. These revised pages or any completely new tariff should not be submitted in a binder but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support volumes submitted

with these revisions and associate the list with the cost volumes and the transmittal letter.

3. Clearly label all boxes containing cost support volumes as to their contents, e.g., BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, VOLS. 1, 2, 3,4, BOX 1 of 5.

4. Submit cost support material in a 3-ring binder pursuant to Public Notice dated December 13, 1986, DA 86-337, and label the volumes of cost support on the spine of the binder with the name of the carrier, the transmittal number, the subject of the filing, the volume number and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR. #XXX, 1993 ACCESS CHARGE TARIFF FILING, VOL. 2-2 OF 2, APR. 2, 1993.

5. Each carrier should submit its respective Tariff Review Plan and Certification in a separately bound package as required by Commission Requirements for Cost Support Material To Be Filed with 1993 Annual Access Tariffs, Order, DA 93-192, released February 18, 1993.

6. In addition to the paper copies, all companies must submit their Tariff Review Plan information in four copies on computer "floppy disks". Price cap carriers must submit their data in Lotus 1-2-3, Release 3.1 format, using the Analyzer spreadsheet provided by the Bureau. The file shall be named COSAAN93, where "COSA" is the company study area code. The full rate detail spreadsheet shall be provided in a separate Lotus 1-2-3, Release 3.1 spreadsheet format, named COSAA93R, where "COSA" is the company's study area code. These files shall be submitted on either 5 1/4 or 3 1/2 inch high density floppy disks. Tier 1 and Tier 2 rate of return carriers should follow the rules for submission of data to the Commission on magnetic media contained in the 1989 Tariff Review Plan (TRP). These carriers should also follow the technical documentation from the 1989 TRP, appropriately updated, for all TRP charts, except COS-1(P) for which the carriers should use the documentation for ARMIS reports 43-01. For filing chart COS-1(P) on diskettes, carriers should follow the instructions for ARMIS report 43-01. As indicated in the last sheet of this Attachment, one copy of the "floppy disks" should be filed with Mark Uretsky, Tariff Review Branch in Room 514. One copy should be filed with Barbara Van Hagen, Accounting and Audits Division, 2000 L St., N.W., Room 812, and the third copy should be filed with Peyton Wynns, Industry Analysis Division, 1250 23rd St., N.W., Room 10.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due April 27, 1993 regardless of whether the tariff revisions are submitted on or before April 2, 1993. Replies may be filed only by the publishing carriers and will be due on May 10, 1993. Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and not a docket number. Petitions should be organized where possible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be

served simultaneously upon the publishing carrier or petitioner. In addition, ITS must be served with a copy in Room 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary. These comments should specify that they concern the 1993 Annual Access Tariff Filings or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the 1993 Annual Access Tariff Filings may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in Room 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's Commercial Contractor, ITS.

For further information, contact: Judith A. Nitsche, Tariff Review Branch (202) 632-5550

1993 ANNUAL ACCESS TARIFF FILINGS

OFFICIAL COPIES	TRANS. LETTER	REVISED TARIFF PAGES	Tariff Review Plan HARD COPY	Tariff Review Plan DISKETTE	VOLUME 1 D&J ONLY	COST SUPPORT VOL. 1 D&J PLUS REMAINDER OF COST MATERIAL
SECRETARY'S OFFICE - ROOM 222	1	2	-	-	-	-
PUBLIC REFERENCE ROOM	1	1	-	-	-	-
ITS - ROOM 535 1919 M ST., N.W.	1	1	1	1	-	1
COURTESY COPIES						
ANN STEVENS ROOM 514	1	-	-	-	1	-
JUDY NITSCHE ROOM 514	1	1	-	-	1	-
MARK URETSKY ROOM 514	1	-	2	1	-	2
PEYTON WYNNS 1250 23RD ST., N.W. ROOM 10	-	-	-	1	-	-
BARBARA VAN HAGEN 2000 L ST., N.W. ROOM 812	1	1	1	1	-	1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA — File No. W-P-C-6834

For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain, facilities and equipment to test a new technology for use in providing video dial-tone within a geographically defined trial area in northern Virginia

ORDER AND AUTHORIZATION

Adopted: March 23, 1993; Released: March 25, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. Before the Commission is an application of The Chesapeake and Potomac Telephone Company of Virginia ("C&P") filed pursuant to Section 214 of the Communications Act of 1934, as amended,[1] and Section 63.54 of the Commission's rules, as amended by the Commission's *Second Report and Order*.[2] C&P's application seeks authority to conduct a limited technical trial to test a new technology that may be capable of delivering video dialtone service[3] using copper loop facilities. Specifically, C&P seeks to test the delivery of compressed video signals over existing copper loop facilities, a video gateway capability that allows residential subscribers to select video programming, ancillary services including digitizing, compressing, and storing video programming, and video customer premise equipment (CPE). For the reasons set forth herein, we grant the application of C&P subject to several conditions.

II. BACKGROUND

2. In the *Second Report and Order*, the Commission determined that, through video dialtone, local telephone companies could participate in the video marketplace, consistent with the statutory telephone company-cable television cross-ownership restrictions.[4] The Commission also determined that a Section 214 application is the proper procedural vehicle for proposing video dialtone services.[5]

3. In its application, C&P requests authority to conduct a video dialtone trial using Asymmetric Digital Subscriber Line (ADSL) technology. ADSL technology, according to C&P, permits a video signal to be delivered to residential subscribers along with basic telephone service over the same copper loop facilities. C&P states that before using ADSL technology to provide a commercial service, the technology must be tested under real world conditions in the network. Furthermore, C&P states that its trial is consistent with the definition of video dialtone in that it will provide a basic, common carrier platform that is capable of serving multiple video programmers. C&P states that it will also provide enhanced and nonregulated non-common carrier services; these services include the digitization, compression and storage of video programming, as well as the provision of video CPE. C&P will offer the video dialtone trial service to 400 end user participants, all of whom will be employees of Bell Atlantic companies, including employees of C&P. C&P states that Bell Atlantic Network Services, Inc. (NSI) will provide the enhanced services and the video CPE for the trial. C&P's application is for a trial lasting no more than two years.

4. C&P's application is opposed by the National Cable Television Association (NCTA) and the Public Service Commission of the District of Columbia (D.C. PSC). In addition, the Pennsylvania Office of Consumer Advocate (PaOCA) filed a "Request for Consumer Safeguards". Responsive pleadings were filed by C&P and NCTA.[6] On February 19, 1993, the Commission submitted a list of questions to C&P regarding its Section 214 application. On February 22, 1993, C&P submitted its responses [herein "C&P Answers"] and served a copy on all parties to this proceeding.

III. CONTENTIONS

5. In opposing the C&P proposal, NCTA states only one objection specific to the C&P application - that the pro-

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[1] 47 U.S.C. §§ 214.

[2] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation To Congress, And Second Further Notice Of Proposed Rulemaking, 7 FCC Rcd 5781 (1992), (*Second Report and Order), pets. for recon. pending, pets. for rev. pending, Mankato Citizens Telephone Company, et al v. FCC and USA*, (No. 92-1404), (D.C. Cir. Sept.9, 1992), *appeal pending sub nom.*

[3] "Video dialtone" is defined as the provision by a local exchange telephone company of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis. A "basic platform" is a common carriage transmission service coupled with the means by which customers can access any or all video programming. If a local exchange carrier provides such a basic platform, it is permitted to provide enhanced and unregulated non-common carrier services to customers of the platform in addition to the basic common carrier services. *Second Report and Order* at 5783.

[4] *Second Report and Order* at 5783.

[5] *Second Report and Order* at 5820. Generally, Section 214 requires Commission authorization before a carrier extends a new interstate line of communication. A "line" includes any channel of communication established by appropriate equipment.

[6] In addition, comments were filed late by District of Columbia Office of the People's Counsel ("D.C. OPC") and Consumer Federation of America ("CFA"). These comments largely reflect the concerns raised by NCTA, D.C. PSC and PaOCA. They are considered in the interest of a complete record.

posal does not meet the definition of video dialtone.[7] NCTA contends that C&P's proposal does not qualify as video dialtone because C&P will discriminate among video programmers, determine how the video programming is presented for sale to consumers and deal directly with subscribers.[8] According to NCTA, C&P is not providing a non-discriminatory, common carrier platform because it will determine which programmers will have access to the basic platform, and in fact, has consummated contracts with these programmers before filing tariffs.[9] In addition, NCTA states that C&P will make decisions regarding the placement and timing of programming on the system.[10] Moreover, NCTA contends that, contrary to the requirements of video dialtone, C&P makes no arrangements for competitive enhanced gateways.[11] In addition, NCTA argues that the Commission's rules prohibit C&P from having "any relationship with cable subscribers" such as choosing the group of trial participants.[12]

6. NCTA, D.C. PSC, and PaOCA also contend that the Commission must resolve questions regarding cost allocations and jurisdictional separations in the context of this application in order to ensure that improper cross-subsidization does not occur.[13] NCTA states that although C&P proposes only a technology trial, Commission action upon this application will create a precedent for the treatment of future video dialtone services.[14] Generally, these parties state that some of the costs of existing copper loop facilities, rather than just the incremental video dialtone costs, must be allocated to video dialtone services in order to avoid the cross-subsidization of video by voice services.[15] PaOCA states that the Commission must ensure that the same jurisdiction that receives the video dialtone revenues will be responsible for the related video dialtone costs.[16] NCTA states that until the Commission determines the proper assignment of joint plant, it cannot determine whether rates are just and reasonable.[17]

7. NCTA, D.C. PSC and PaOCA further contend that the Commission's existing safeguards are inadequate to prevent discrimination and cross-subsidization by C&P. NCTA contends that C&P fails to explain how it will separate the costs of its regulated and unregulated services.[18] NCTA further contends the Commission must reassess the applicability of existing safeguards such as ONA requirements, joint marketing activities and the use of Customer Proprietary Network Information.[19]

8. In opposition, C&P states its proposed trial does meet the requirements for video dialtone. C&P states that the platform it will be testing will be capable of transmitting compressed video programming on a nondiscriminatory common carrier basis and will be available to multiple video programmers.[20] C&P further § states that in addition to such non-discriminatory access, "any video programmers or other enhanced service providers that wish to connect their own video server to the trial platform may do so..."[21] C&P also states that it will not determine how video programming is presented for sale to consumers, but rather the unaffiliated video programmers will determine the content of the video programming.[22] C&P additionally states that the fact that it will choose the trial "subscribers" is irrelevant because the Commission's rules do not bar such an action.[23] In response to contentions regarding cost allocations and jurisdictional separations, C&P states that under its proposal, regulated services will not be assigned any of the costs of the trial or any costs that would not have been incurred if C&P did not conduct the trial.[24] C&P also states that the broad jurisdictional issues raised are beyond the scope of this proceeding.[25] Finally, C&P states that with respect to appropriate video dialtone safeguards, the Commission has already held that existing safeguards are adequate and no reason has been presented to alter this conclusion in the context of this application.[26]

IV. DISCUSSION

9. We conclude that the public interest, convenience and necessity would be served by granting Section 214 authority for this technology trial. The Commission has a mandate under the Communications Act to encourage technological innovation in communications and to expedite the introduction of new technology subject to other public interest considerations.[27] Indeed, the Commission's rules recognize that experiments can be useful to develop new technologies and their acceptability to users. *See e.g.* 47 C.F.R. § 5.1 on radio experiments. Significantly, in the *Second Report and Order*, the Commission found that it is in the public interest to encourage trials of video dialtone technology in order to fulfill our goals of promoting an ad-

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[7] NCTA acknowledges that its other objections -- that video dialtone is impermissible because neither the local telephone company nor its customer-programmers will receive a local cable television franchise; that video dialtone unlawfully permits local telephone companies to become involved in previously prohibited unregulated ancillary services; and that video dialtone will result in anticompetitive conduct by the local telephone companies -- have been raised previously and decided in the video dialtone rulemaking proceedings. NCTA Petition at 2.

[8] NCTA Petition at 5.

[9] NCTA's Reply at 3.

[10] NCTA Petition at 7; CFA Comments at 6.

[11] NCTA Petition at 16.

[12] NCTA Petition at 7-8.

[13] NCTA Petition at 9-14; PaOCA Petition at 3-4; D.C. PSC Petition at 2. *See also* D.C. OPC Petition at 4. PaOCA states, however, that given the potential benefits of the technology trial and the relatively small deployment proposed, it does not object to allowing the trial to go forward while the Commission considers the appropriate course of action. PaOCA Petition at 5.

[14] NCTA Petition at 11; NCTA Reply at 11.

[15] NCTA Petition at 11; D.C. PSC Petition at 3; PaOCA Petition at 8.

[16] PaOCA Petition at 9.

[17] NCTA Reply at 11.

[18] NCTA Petition at 16; NCTA Reply at 11-12.

[19] NCTA Petition at 14-17.

[20] C&P Opposition, Declaration of Brian D. Oliver, at 2; C&P Answers at 4-5.

[21] C&P Answers at 3.

[22] C&P Opposition at 4.

[23] C&P Opposition at 4.

[24] C&P Opposition at 5.

[25] *Id.* at 6.

[26] C&P Opposition at 4-5.

[27] Sections 1, 7, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 157 and 218.

vanced cost-effective telecommunications infrastructure.[28] On the basis of the record, we find that C&P's video dialtone technology trial will further the public interest goals identified by the Commission in the *Second Report and Order* including: 1) investment in an advanced telecommunications infrastructure;[29] 2) competition in the provision of video services; and 3) additional opportunities for consumer choice through a diversity of video services.[30] C&P states that it will test the use of ADSL technology to deliver video programming over copper loop facilities, a digital cross-connect switch that allows residential subscribers to select video programming, and enhanced services (e.g., digitizing, compressing, and storing video programming and video customer premise equipment). We believe that ADSL technology has the potential to provide a link in the evolution of video dialtone. For instance, in areas where fiber is not yet deployed or cannot be economically deployed, ADSL technology may enable residential subscribers to receive some of the benefits of video dialtone service. Furthermore, we find that the trial could foster the development of a competitive video marketplace that brings consumers a diversity of video services, competitive prices, and better quality of service. However, we believe that approving a trial length of two years is unwarranted at this time. We find that a trial length of one year should be sufficient for a technology trial as described in C&P's application. We will, however, consider a request for an extension of the trial upon a showing that an extension is required to further the trial objectives.[31] So that we can determine whether the trial fulfills its objectives, we condition the grant of this application upon C&P reporting, six months after commencement of the trial and at the end of the one year trial period authorized herein, on the effectiveness and quality of services using ADSL technology to deliver compressed video over copper loop facilities.

10. Under the video dialtone framework, consistent with the telephone company-cable television cross-ownership restrictions, local telephone companies are allowed to participate in the video marketplace. This framework requires local telephone companies offering video dialtone to make available to multiple video programmers, on a non-discriminatory common carrier basis, a basic common carrier platform for the delivery of video programming and other services to end users. By providing this basic common carrier platform, local telephone companies are permitted to exceed the "carrier-user relationship" with video programmers that are customers of, interconnect with, or share the construction and/or operation of, the basic common carrier platform.[32] A local telephone company may not, however, determine how video programming is presented for sale to consumers, including making decisions concerning bundling, tiering or the price, terms, and conditions of video programming offered to consumers.[33] In developing this regulatory framework, the Commission purposely avoided video dialtone service descriptions or regulatory classifications of such services, choosing instead to rely upon the marketplace and technology to dictate the development of video dialtone.[34]

11. We conclude that C&P's proposed video dialtone technology trial is generally consistent with the framework for the provision of video dialtone services and that the grant of the application, subject to several conditions, will serve the public interest. C&P's proposal meets the requirements for providing a video dialtone technology trial. First, we find that, contrary to the contentions of NCTA, C&P is proposing to offer to multiple video programmers on a non-discriminatory basis a basic platform as required in the *Second Report and Order*.[35] C&P states that not only have several independent video programmers agreed to provide video programming for the trial, but that the "technical trial is open to all video programmers who wish to participate..."[36] According to C&P, the capacity of the basic platform to accommodate video programmers is unlimited.[37] Moreover, C&P states that to the extent there are capacity limitations, such as the capacity limitations of the video storage server used to digitize, compress and store video programming, it will provide capacity on a first-come, first-served basis and will accommodate any video programmer that desires to connect its own video server to the video dialtone trial platform.[38] As a result, we find that C&P is properly offering the video dialtone platform on a non-discriminatory basis within the meaning of our original video dialtone framework.[39]

12. Second, we find that C&P's proposal does not contemplate impermissible involvement of C&P in decisions regarding the presentation of video programming to consumers. While NCTA contends that C&P, not the video programmer, will make some of the decisions regarding the placement and timing of programming, it provides no evidence to support this statement.[40] C&P clearly states that video programmers will retain control over the programming they provide, including its content, and adds that it is

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[28] *Second Report and Order* at 5836.

[29] We note, however, that only successful video dialtone trials may advance this goal, and that technical trials generally are based on the need to develop and test technology which may not eventually be used in the network.

[30] *Second Report and Order* at 5787.

[31] We recognize the experimental nature of the trial and the need to test the performance and reliability of ADSL technology. C&P Answers at 2.

[32] Generally, local exchange carriers providing facilities for the transmission of video programming within their telephone service areas are prohibited from entering into relationships with video programmers except in "carrier-user" relationships, which encompass communications services and functions provided on a common carrier basis. 47 C.F.R. § 63.54; *Second Report and Order* at 5787, note 18.

[33] *Second Report and Order* at 5797-98.

[34] *Second Report and Order* at 5812.

[35] *Second Report and Order* at 5797.

[36] C&P Opposition, Declaration of Brian D. Oliver at 3; C&P Answers at 4.

[37] C&P Answers at 5.

[38] C&P Answers at 4-5. Further, C&P has committed itself to providing access to the server by multiple video programmers.

[39] Permitting C&P to proceed with this technology trial could provide useful information to the Commission regarding the offering of video programming on a non-discriminatory basis by video dialtone providers. Consequently, as a condition of approving the application, we will require C&P to provide statements from the video programmers and trial participants concerning discrimination. In addition, any programmer who is not a trial participant because of alleged discrimination by C&P may want to notify us of such conduct.

[40] We also reject NCTA's contention that either the statutory cross-ownership ban or our video dialtone rules prohibit C&P from having a direct relationship with subscribers. The Commission determined that although local telephone companies could not provide video programming to subscribers, they could

the trial participants rather than C&P that will select the programming they want to see and decide when they want to see it.[41] We do recognize, however, that under its proposal, C&P has determined that the end users will not be charged for the video programming during the trial.[42] The decision by C&P that end users not be charged for the video programming is a "decision concerning the price of video programming offered to consumers" which is prohibited in the *Second Report and Order*.[43] Therefore, we condition the grant to C&P as follows: C&P must allow the video programmers to decide whether they will charge end users for video programming offered during the trial and must not involve itself in decisions involving the presentation of video programming to the end users. Although we recognize that the experimental nature of the trial, with the uncertainty of its load conditions, picture quality, ease of use and untested network components, may not lend itself to charging trial participants,[44] the decision not to charge end users must reside with the video programmers and not with C&P.

13. We also find that because this will be a limited trial involving relatively small costs, C&P's accounting of only incremental costs incurred in the provision of the basic platform is acceptable. In the context of the provision of the basic platform for the trial, C&P proposes to account separately for all direct incremental costs it incurs.[45] These costs include investment and expenses associated with the trial as well as development costs. NCTA, D.C. PSC, and PaOCA object to C&P's proposal on the grounds that C&P does not allocate any of the embedded costs of the local loops to the video dialtone trial. In determining an appropriate accounting method for the costs of providing the basic platform, we are guided by the principles that all video dialtone costs should be assigned to the video dialtone trial and that ratepayers of other regulated services may not be subjected to unjust and unreasonable rates. To ensure that these costs are not borne by ratepayers of other regulated services, C&P must segregate the direct incremental cost of the basic platform in subsidiary accounting records.[46] If these costs are not recovered from future video dialtone services, these costs must be borne by shareholders rather than the ratepayers of other regulated services. While we recognize the importance of the cost allocation issues raised, we agree with PaOCA that given the potential benefits and the relatively small deployment proposed, this approach will serve the public interest at this time.[47] Furthermore, we will require C&P to monitor the use of the local loops and report the percentage of use of the local loop for video and telephone services. In this way, the trial can provide valuable information regarding the commenters' concerns over the proper allocation of the local loop to video and telephone users.

14. We likewise reject the contention that we should suspend this proceeding pending the development of procedures to allocate the costs of the trial between regulated and unregulated activities. C&P states that it will account for the costs of providing unregulated video dialtone services on a fully allocated basis in accordance with Part 64 of the Commission's rules.[48] To the extent that the nonregulated components of the video dialtone trial are not already covered by C&P's cost allocation manual, C&P will have to revise its manual to show the procedures it intends to use to allocate the costs of nonregulated components of video dialtone services to nonregulated activities for the duration of the trial.[49] These temporary revisions will be subject to public comment and Commission scrutiny. C&P will have to file permanent revisions, as necessary, if and when it decides to offer video dialtone services generally. Our decision on any temporary revisions will not finally resolve any issue with regard to video dialtone services. Under these circumstances, we find that the concerns raised by NCTA, D.C. PSC and PaOCA regarding the allocation of video dialtone costs between regulated and nonregulated activities are premature, and provide no reason for delaying the proposed trial.

15. In the context of C&P's limited technology trial, we believe that our existing safeguards, in conjunction with the requirement that C&P offer non-discriminatory access to the basic platform, are adequate to protect against anticompetitive conduct by C&P. Among these safeguards are the cost allocation rules and cost accounting safeguards designed to separate nonregulated service costs from regulated service costs,[50] our ONA policy, which we believe constitutes an effective safeguard to ensure that independent enhanced service providers are able to obtain nondiscriminatory access to basic services,[51] and our non-discrimination reporting requirements, and network disclosure rules.[52] We are not persuaded, nor has it been shown by the commenters, that these safeguards are inadequate to protect against cross-subsidization and discrimination by C&P.

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continue to provide enhanced services, including those associated with the provision of video programming. *See Second Report and Order* at 5812-5818. NCTA advances no new arguments in this proceeding. We also note that to prevent C&P from using its own employees as trial participants would erect an unnecessary barrier to experimenting with a new technology and would therefore substantially disserve the public interest.

[41] C&P Opposition at 4; C&P Answers at 4.

[42] C&P Application at 3-4.

[43] *Second Report and Order* at 5789. A local telephone company may not select video programming by determining how programming is presented for sale to consumers, including making decisions concerning the price of video programming offered to consumers.

[44] C&P Answers at 1.

[45] C&P Opposition at 5; C&P Motion To Strike at 2, Note 4.

[46] C&P must account for all its costs associated with the trial, including development costs and expenses, in accordance with Part 32 and Section 64.901 of the Commission's rules.

[47] PaOCA Petition at 5.

[48] C&P Application at 9; C&P Motion To Strike at 2.

[49] *See* Section 64.903 of the Commission's rules.

[50] Separation of Costs of Regulated Telephone Service Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987), (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom., Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[51] Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991), (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending, California v. FCC*, (9th Cir. Feb. 14, 1992) (No. 92-70083, consolidated on June 2, 1992 with *MCI v. FCC* (No. 921-70186), *NY v. FCC* (No.92-70217), *ANPA v. FCC* (No. 92-70261); *California v. FCC* (9th Cir. Feb. 21, 1992) (No. 92-70105), consolidated on June 2, 1992 with *NYPSC v. FCC* (No. 92-70281).

[52] *BOC Safeguards Order*, 6 FCC Rcd at 7601-14.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the application of C&P Telephone Company of Virginia (File No. WPC-6834) IS GRANTED, and the applicant is authorized to provide a video dialtone trial in its northern Virginia service area commencing on the date of adoption of this Order.

17. IT IS FURTHER ORDERED, that grant of the application provided for herein IS SUBJECT TO the following conditions:

a) That no costs associated with the construction, operation or use of the video dialtone trial shall appear in any C&P rate base or as a regulated expense without prior authorization from this Commission.

b) C&P must not involve itself in decisions involving the presentation of video programming to end users, and specifically, must allow the video programmers participating in the trial to decide whether they will charge for video programming offered to end users. C&P must not discriminate against video programmers based upon their decision to charge or not to charge for the programming offered during the trial.

c) That the trial length shall be one year commencing on the date of adoption of this Order.

d) That C&P shall file any revisions to its Cost Allocation Manual (CAM), as necessary, prior to providing any enhanced services.

e) That C&P shall submit to the Chief, Domestic Services Branch, Common Carrier Bureau, six months after commencement of the trial and at the end of the one year trial period, written reports. Each report shall:

1) include a statement from each programmer using its services whether that programmer believes it has been discriminated against by C&P;

2) include a response from C&P to each programmer's statement, stating whether it agrees or disagrees with that statement, and why;

3) detail the percentage of use of the local loop for video and telephone services; and

4) evaluate the effectiveness of using ADSL technology to provide voice, data, and video on an integrated basis over copper loop facilities. Specifically, C&P shall provide information on the quality of the voice, data, and video using ADSL technology. In addition, C&P shall provide subjective evaluations by trial participants of the quality of the programming and other services offered.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-298

In the Matter of

Amendment of the Commission's
Rules to Establish a Single AM
Radio Stereophonic Transmitting
Equipment Standard

ORDER DENYING REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: March 26, 1993; Released: March 29, 1993

Comment Date: April 5, 1993
Reply Comment Date: April 20, 1993

By the Chief Engineer:

1. In a letter to the Secretary, dated March 22, 1993, Mr. Leonard R. Kahn requests, *inter alia*, that the deadline for filing comments in the above-captioned proceeding be extended to a later date. Mr. Kahn requests this extension in order to meet with Commission staff "for the purpose of obtaining staff guidance in the formulation" of his comments to this proceeding.

2. The Commission does not routinely grant extensions of time.[1] We do not believe that a request for an *ex parte* meeting with Commission staff is sufficient reason to warrant a delay in this proceeding. We believe that the current comment period provides adequate opportunity and time for interested parties to participate in this proceeding. Thus, we do not find that the public interest would be served by a delay in this proceeding. Accordingly, IT IS ORDERED, that the request for an extension of time in which to file comments in this proceeding, IS DENIED.

3. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46. For further information, contact David Means, Engineering Evaluation Branch, Office of Engineering and Technology, (301) 725-1585 ext. 206.

Federal Communications Commission

Thomas P. Stanley
Chief Engineer

[1] *See* 47 C.F.R. Section 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

800 Data Base Access Tariffs

ORDER

Adopted: March 26, 1993; Released: March 26, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. The current deadline for filing replies to petitions for rejection or suspension of the above-referenced tariffs is March 29, 1993. *See* 800 Data Base Access Tariffs, DA 93-323 (released Mar. 18, 1993). On March 24, 1993, Pacific Bell (Pacific) filed a "Motion to Extend Time to File Replies" to petitions filed against the above-referenced tariffs. That motion states that eleven parties filed "extremely lengthy" petitions which covered a wide range of issues. Pacific argues that, because of the size and complexity of the record, it is extremely difficult for Pacific to put together a complete reply by March 29, 1993. Pacific, therefore, requires an extension of time, to April 2, 1993, fo file its reply to petitions to suspend or reject its 800 data base tariff.

2. The Division has reviewed the petitioner's request for extension of time and has determined that good cause has been shown to grant all interested parties additional time, until April 2, 1993, to file replies relating to the above-referenced tariffs.

3. Accordingly, IT IS ORDERED that the petition for extension of time filed by Pacific Bell IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Brookings Municipal Telephone

Petitions for Waiver of Sections
61.39(e)(b) and 61.39(b)(2) of the
Commission's Rules

ORDER

Adopted: March 26, 1993; Released: March 26, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 24, 1992, Brookings Municipal Telephone (Brookings) filed a petition for waiver of Section 61.39(b)(2) of the Commission's Rules, 47 C.F.R. § 61.39(b)(2), to issue its own interstate traffic sensitive tariff, and to include in that tariff rates for interstate special access services that are less than rates calculated according to Brookings' average schedule settlements from the National Exchange Carrier Association (NECA) pool. On December 14, 1992, the Commission solicited comments on the Brookings petition;[1] none were received. Brookings subsequently filed for waiver of Section 69.3(e)(6) of the Commission's Rules, 47 C.F.R. § 69.3(e)(6), on December 19, 1992 to permit late notification to NECA of its intent to leave the traffic sensitive pool. Section 69.3(e)(6) required that such notification to NECA be made no later than December 31, 1992. For the reasons discussed below, we grant both waiver requests of Brookings on the condition that Brookings submit cost support to justify the rate levels.

II. BACKGROUND

2. Brookings is a small telephone company, serving approximately 11,000 access lines in Brookings, South Dakota. In 1956, Northwestern Bell Telephone Company (then, an AT&T subsidiary) constructed copper analog interoffice facilities between Brookings' central office and Northwestern Bell's central office in Volga, South Dakota. From Volga, US West transports traffic to Sioux Falls, South Dakota.[2] The Brookings-Volga-Sioux Falls facility is presently operated by US West Communications (US West) to transport special access traffic of Brookings' local exchange customers between Brookings and interexchange carrier points of presence in and around Sioux Falls. Brookings Nov. Petition at 3. Since January 1990, Brookings also has operated a fiber optic facility between Brookings and Sioux Falls, which transports interstate switched access traffic and interconnects with the South Dakota Network, Inc.'s centralized equal access facility in Sioux Falls. Brookings also uses the facility to provide special access services to four Brookings/AT&T customers that require digital facilities. *Id.* at 3-4.

III. WAIVER REQUESTS

3. Brookings petitions to leave the NECA traffic sensitive pool and file its own traffic sensitive tariff under Section 61.39, which would include its switched traffic sensitive rates and its special access rates. In the absence of a waiver of Section 61.39(b)(2), Brookings would calculate its initial and subsequent rates on the basis of its NECA pool settlements. Under this scenario, Brookings' special access rates would be only slightly less than the NECA rates.[3] Brookings proposes to set its initial and subsequent special access rates based "on market conditions." The switched traffic sensitive rates would be calculated in compliance with Section 61.39. *Id.* at 6-7.

4. Brookings argues that the rate disparity between the NECA special access rates and those of US West effectively freezes Brookings out of the special access market in its service territory. Because Brookings expects the value of the special access market to double over the next five years, it believes that its competitive position will worsen. Brookings also asserts that, without its requested waiver, all of the special access traffic from its exchange will be carried by US West. *Id.* at 6. Brookings considered using the Commission's streamlined tariff procedures and establishing its own traffic sensitive rates based on its NECA pool settlements;[4] however, this would still produce rates substantially higher than those of US West. *Id.* at 5-6.

5. Because Brookings seeks to file its traffic sensitive tariff on April 2, 1993, Section 69.3(e)(6) requires that Brookings notify NECA of Brookings' intent to leave the pool no later than December 31, 1992. On December 17, 1992, Brookings filed a request to waive Section 69.3(e)(6). In that December petition, Brookings proposes that it notify NECA of Brookings' intent to leave the traffic sensitive pool no later than ten days after release of an order granting a waiver of Section 61.39(b)(2). Brookings Dec. Petition at 1-4. Brookings argues that waiver of the notification time requirement will not significantly affect NECA's calculation of its traffic sensitive revenue requirement and should not prejudice NECA or any pool member. Brookings substantiates these assertions by stating that its interstate traffic sensitive revenues for 1991 represented less than 0.159 percent of NECA's traffic sensitive pool revenue requirement for 1992. *Id.* at 4-5.

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[1] Brookings Municipal Telephone Files Petition For Waiver To Issue Its Own Interstate Traffic Sensitive Tariff, Public Notice, 7 FCC Rcd 8613 (1992).

[2] US West maintains both copper-analog and fiber-optic facilities between Volga and Sioux Falls.

[3] Brookings' settlement mileage rates would be from 3.06 to 21.6 times higher than US West's rates. Brookings' settlement channel termination rates would range from 104.4 percent to 250 percent higher than US West's.

[4] Section 61.39(b)(2) states: "the local exchange company which is an average schedule carrier must propose rates based on . . . the local exchange carrier's most recent annual settlement from [NECA]."

IV. DISCUSSION

6. Based in part on the showing made by Brookings, and on our own analysis, we conclude that good cause exists for a limited waiver[5] of Section 61.39(b)(2) of the Commission's Rules to permit Brookings to issue its own interstate traffic sensitive tariff and to include in that tariff interstate special access rates based on an acceptable cost methodology rather than average schedule settlements.[6] As an average schedule company, Brookings is required to base its Section 61.39 rates on historical average schedule settlements. Brookings argues that the special access rates resulting from applying those historical settlements are substantially higher than those developed under various acceptable cost-based methodologies. To the extent that Brookings can cost justify lower rates, it is in the public interest to allow it to do so. By permitting Brookings to establish special access rates using a cost-based methodology, we are permitting no more latitude than would be enjoyed by a cost company filing under Section 61.39.[7] Section 61.39(b)(2) requires use of previous average schedule settlement s as a surrogate for actual costs for the development of rates. The average schedules are updated annually to ensure that customers are not over-charged for services. Brookings' use of its actual costs to develop rates, will provide at least as much assurance of the reasonableness of the rates. Accordingly, under this waiver, Brookings may base its special access rates on costs. We also will require Brookings to accompany its proposed tariff with supporting data for all the rates in its interstate traffic sensitive tariff. We note the unusual historical circumstances concerning the facilities at issue in Brookings' petition and limit this waiver to the facts in this case.

7. We also conclude that Brookings has shown substantial need to be permitted to file its traffic sensitive tariff on April 2, 1993, and has provided convincing evidence that a waiver of Section 69.3(e)(6) will not inconvenience or otherwise harm NECA, its participating carriers, or Brookings' special access customers. We therefore find that good cause exists for waiving Section 69.3(e)(6).

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that Brookings Municipal Telephone IS GRANTED a waiver of Section 61.39(b)(2), 47 C.F.R. § 61.39(b)(2), of the Commission's Rules, consistent with the discussion in paragraph 7 of this order.

9. IT IS FURTHER ORDERED that Brookings Municipal Telephone IS GRANTED a waiver of Section 69.3(e)(6), 47 C.F.R. § 69.3(e)(6), of the Commission's Rules, to notify the National Exchange Carrier Association, no later than five days after the release of this Order, that it will not be cross-referenced in NECA Tariff F.C.C. No. 5, to be filed April 1, 1993, for traffic sensitive rates.

10. IT IS FURTHER ORDERED that Special Permission No. 93-248 is assigned for this purpose.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[5] *See Northeast Cellular L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). *See also* 47 C.F.R. § 1.3.

[6] We specifically do not find Brookings' competitive necessity arguments persuasive and, therefore, do not grant Brookings the ability to set rates based on what it perceives as market conditions.

[7] In fact, Brookings could have avoided the need for a waiver if it had converted from average schedule to cost. However, Brookings did not wish to pursue this alternative. We note that, notwithstanding the possible applicability of other provisions of our Rules, *see e.g.* 47 C.F.R. § 69.605(c), this waiver shall not affect Brookings' status as an average schedule company.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal Nos. 4786 and 4959

Tariff F.C.C. No. 2

ORDER

Adopted: March 26, 1993; Released: March 26, 1993

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) filed Transmittal No. 4786 on February 3, 1993, to introduce the Partners in Business (PIB) program,[1] which allows customers of AT&T 800 service[2] who achieve a minimum usage of $200.00 per month per PIB account to earn points that they can redeem through AT&T for a variety of services or products. AT&T Tariff F.C.C. No. 2, 1st Revised Page 70.1.1 (March 25, 1993). Transmittal No. 4786 is scheduled to become effective March 27, 1993.

2. Customers may earn points in a number of ways, including: (1) subscribing to particular 800 service features; (2) subscribing to a new 800 service in a new routing arrangement; (3) achieving growth in 800 service usage over specific time periods; (4) achieving an anniversary date of participation in the program; (5) achieving usage volume in term plans; and (6) settling certain 800 service customers complaints with AT&T. The number of points that customers will earn for participating in the above activities is contained in the tariff. AT&T Tariff F.C.C. No. 2, 1st Revised Pages 70.1.1 - .5 (March 25, 1993).

3. Customers may redeem PIB program points for a variety of offerings, including: (1) travel accommodations, such as transportation tickets, hotel or cruise accommodations, car rentals, theater or amusement park tickets, and packaged travel tours; (2) training in skills, such as sales calling or customer service calling, and call center workshops; (3) consultation, such as call center design, call center site selection, and review of existing call centers; (4) advertising in AT&T's 800 Directory listing or custom advertising; and (5) network management, including tools for analyzing call detail, routing control capacity, network performance monitoring, and operations analysis. The number of points to be redeemed for these offerings and the maximum value of the offerings that can be redeemed are described in the tariff. *Id.* at 1st Revised Page 70.1.5, Original Page 70.1.5.1, 1st Revised Page 70.1.6, Original Page 70.1.6.1, 1st Revised Page 70.1.7, and 1st Revised Page 70.1.8.

4. On February 18, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate the transmittal. AT&T replied on March 1, 1993.

5. MCI argues that Transmittal 4786 provides an unlawful rebate in violation of Section 203(c) of the Communications Act, 47 U.S.C. § 203(c), because it refunds or remits a portion of the charges specified in the tariff. MCI Petition at 1-3. Moreover, contends MCI, the tariff is unlawfully vague and ambiguous in violation of Section 203(a) of the Communications Act, 47 U.S.C. § 203(a), and Sections 61.2 and 61.54 of the Commission's Rules, 47 C.F.R. §§ 61.2, 61.54, because it provides points of no defined economic value to customers for their use in purchasing undefined services from AT&T. *Id.* at 3-4.

6. MCI also asserts that the tariff is unlawfully discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), because it provides tailored customer pricing through rebates of unspecified value to its customers, with special preferences for those who require inducements to remain with AT&T after 800 number portability. *Id.* at 3-4. Finally, MCI maintains that Transmittal 4786 is unjust and unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), because it allows AT&T to assemble awards and charge whatever the market will bear, taking points rather than currency in exchange for its goods and services. *Id.* at 4.[3]

7. AT&T replies that the PIB program is neither an unlawful rebate in violation of Section 203(c) of the Act, nor impermissably vague in violation of Section 203(a) of the Act, and Sections 61.2 and 61.54 of the Commission's Rules. According to AT&T, Section 203(c) of the Act, case law, and Commission orders support its position that the PIB program is not an illegal rebate because the terms and conditions of the program are set forth in the tariff. AT&T asserts that the tariff describes the various redemption offers and sets forth the mechanism for obtaining program points, thus enabling customers to calculate their net charges under the tariff. AT&T also states that all PIB program customers pay the same net charge, regardless of which redemption options they choose.[4] AT&T Reply at 2-4. Finally, AT&T maintains that the PIB program is not discriminatory in violation of Section 202(a) of the Act because it is generally available to all similarly-situated users of AT&T 800 service. *Id.* at 6-7.

8. The Common Carrier Bureau has reviewed the transmittals and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

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[1] AT&T subsequently filed revisions to the tariff which, *inter alia*, value the program points at $1.00 in U.S. currency and provide a more detailed redemption schedule for the various redemption offers. AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 4958 (filed Mar. 25, 1993).

[2] Customers subscribing to International 800, Validator 800, and Plan P are not eligible to participate. However, customers subscribing to service that includes the inbound calling capabilities provided in the combined outward calling and inward calling discount plan specified in AT&T Tariff F.C.C. No. 1 may participate in the PIB program. AT&T Tariff F.C.C. No. 2, 22nd Revised Page 70.1 (filed Mar. 25, 1993).

[3] AT&T filed revisions to the tariff which value the program points at $1.00 in U.S. currency. *See* note 1, *supra*.

[4] AT&T subsequently filed tariff revisions that value the program points as $1.00 in U.S. currency. *See* n.1 , *supra*.

9. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 4786, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-87

In re Applications of

Raymond W. Clanton (hereafter "Clanton") — File No. BPH-911216MC

Loren F. Selznick (hereafter "Selznick") — File No. BPH-911216MD

For Construction Permit
for a New FM Station on Channel
279A in El Rio, California

HEARING DESIGNATION ORDER

Adopted: March 23, 1993; Released: April 1, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Selznick has filed such statement, it is deficient. Selznick has not listed any recruitment sources for prospective female employees. Accordingly, Selznick will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Clanton petitioned for leave to amend his application on October 9, 1992 and on March 12, 1993. The accompanying amendments were filed after May 4, 1992, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position, after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting form the amendments will be disallowed.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Selznick shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Clanton ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.1221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in (a) the Standard Document production Order (See Section 1.325(c)(1) of the Rules); and (b) the standardized Intergration statement (See Section 1.325(c)(2) of the Rules, which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration.*, FCC 91-154, paras. 7-8 & n.3, Appendix paras. 3 & 5, Released May 15, 1991.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-94

In re Applications of

Scripps Howard Broadcasting Company — File No. BRCT-910603KX

For Renewal of License of
Station WMAR-TV,
Baltimore, Maryland

and

Four Jacks Broadcasting, Inc. — File No. BPCT-910903KE

For a Construction Permit for
a New Television Facility on
Channel 2 at Baltimore, Maryland

HEARING DESIGNATION ORDER

Adopted: March 22, 1993; Released: April 1, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) the application for renewal of license of station WMAR-TV, Channel 2, Baltimore, Maryland, filed by Scripps Howard Broadcasting Company ("Scripps"), and the mutually-exclusive application of Four Jacks Broadcasting, Inc. ("Four Jacks") for a new commercial television station to operate on Channel 2, Baltimore, Maryland; (2) a petition to deny Four Jacks' application, filed by Scripps, and various responsive pleadings; (3) a petition to dismiss Four Jacks' application, filed by Scripps, and various responsive pleadings.[1]

2. Four Jacks specifies a tower height of 381 meters. However, the record height for the specified tower is only 368.5 meters due to the removal of an antenna from the tower in 1987. Thus, it is not clear that the Federal Aviation Administration has approved the proposed tower increase to 381 meters and that the proposal would not constitute a hazard to air navigation. While these discrepancies do not render the application substantially incomplete, an appropriate issue will be specified to determine whether the tower would constitute a hazard to air navigation.

3. In its Petition to Dismiss, Scripps alleges that the Four Jacks application should not have been accepted for filing because to do so would be a violation of Section 73.3518 of the Rules, which provides, "While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee." Chesapeake Television ("Chesapeake"), the licensee of Station WBFF(TV), Channel 45, (Baltimore, Maryland), is owned indirectly (through Sinclair Broadcast Group, Inc.) by the principals of Four Jacks. Chesapeake filed its license renewal on June 1, 1991. The application was granted September 26, 1991, and thus the renewal application was outstanding when the present application was filed on September 3, 1991. Scripps further alleges that grant of the present application would place the principals of Four Jacks in violation of Section 73.3555 of our Rules. We disagree that the inconsistent application rule precludes our consideration of Four Jacks' application. That rule was not intended to apply to circumstances such as those before us. In the application before us, the principals of Four Jacks have pledged to divest their interests in WBFF(TV) if Four Jacks is the successful applicant. Chesapeake's application for station WBBF(TV) has been granted. Clearly, it would be unfair to require the principals of Four Jacks to give up all interests in WBFF(TV) merely in order to compete for a channel 2 facility. The divestiture pledge removes any concern as to a violation of Section 73.3555 of our Rules. However, any grant of Four Jacks' application will be conditioned appropriately to require divestiture of all interests in WBFF(TV). The Petition to Dismiss will be denied.

4. Except as indicated by the issue specified below, the applicants are qualified to proceed as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Four Jacks whether there is reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

[1] In its petition to deny, Scripps alleges: 1) that Four Jacks' application is substantially incomplete due to inconsistencies concerning Four Jacks' antenna; 2) that Four Jacks has failed to identify a safe transmitter site; 3) that Four Jacks will be incapable, because of its miscalculations of costs, of constructing and operating the station; and 4) that Four Jacks may lack the requisite character to be a Commission licensee. To the extent that the pleading is a pre-designation petition to specify issues, it will be dismissed. *Processing of Contested Broadcasting Applications*, 72 FCC2d 202 (1979).

6. IT IS FURTHER ORDERED, That the Petition to Deny filed by Scripps IS DISMISSED, and the Petition to Dismiss IS DENIED.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

8. IT IS FURTHER ORDERED, That, in the event of the grant of Four Jacks' application for a construction permit for a television station to operate on channel 2 in Baltimore, Maryland, Four Jacks and its principals shall, upon commencement of operations on channel 2, certify to the Commission that they have severed all interest in and connection with television station WBFF(TV), Baltimore, Maryland.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 700, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in that Rule, and shall advise the Commission of the publication of this notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara Kreisman, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-93

In re Applications of

COMMUNITY TV OF SOUTHERN CALIFORNIA — BPET-881012KE

VALLEY PUBLIC TELEVISION, INC. — BPET-900904KE

For Construction Permit
for a New TV Station on Channel *39
Bakersfield, California

HEARING DESIGNATION ORDER

Adopted: March 25, 1993; Released: April 1, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new noncommercial educational television station on Channel *39, Bakersfield, California; a "Petition to Deny, or in the alternative, to Dismiss"[1] filed against the application of Valley Public Television, Inc. (Valley) by Community TV of Southern California (Community)[2] a "Petition for Leave to Amend" filed by Valley;[3] and other related pleadings.

2. The transmitter site proposed by Valley is 85.4 km from the reference point for Channel 25, Ridgecrest, California. Section 73.610 requires a minimum separation of 95.7 km. Therefore, Valley's site would be 10.3 km short-spaced. Valley has requested a waiver of the Rules. Accordingly, an issue will be specified to determine whether circumstances exist which would warrant a waiver of Section 73.610. Since an applicant proposing a short-spaced site is required to make the threshold showing that no suitable fully spaced site is available, the Administrative Law Judge may in assessing those circumstances, consider the fact that the other applicant in this proceeding has specified a fully spaced site.

3. Section 73.685(f) of the Commission's Rules requires an applicant proposing to use a directional antenna to include a tabulation of relative field strength patterns, oriented so that corresponds to True North and tabulated at least every 10 plus any minima and maxima. Valley has not supplied this data. Accordingly, the applicant will be required to submit an amendment with the appropriate information to the presiding Administrative Law Judge and copies to the Chief, Television Branch, and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

4. Except as indicated by the issues specified below the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.[4]

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Valley Public Television, Inc., if circumstances exist which would warrant a waiver of Section 73.610 of the Commission's Rules.

2. To determine, the extent to which each applicant's proposed operation will be integrated into the overall cultural and educational objectives of the respective applicants;

3. To determine, whether the factors in the record demonstrate that one applicant will provide a superior non-commercial educational broadcast service.

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[1] Community's petition to deny is, in essence, a pre-designation petition to specify issues. Such petitions are no longer permitted; therefore, the petition will be dismissed. *Revised Procedures for Processing of Contested Broadcasting Applications*, 72 FCC 2d 202 (1979). Community attempts to raise an issue of acceptability by arguing that Valley has not requested a waiver of the "freeze" on the filing of new applications. However, we have already waived the freeze for Channel *39, Bakersfield, California, when we accepted Community's application for filing and invited competing applications. Valley's application is filed pursuant to that request. Thus, Valley need not seek another waiver.

[2] An informal objection was filed against Community's application on January 18, 1991 by the Committee on Media Integrity. That objection, however, has been disposed of by a separate action.

[3] Valley filed petitions for leave to amend on November 14 and 22, 1991, July 8, 1992, and December 17, 1992, accompanied by amendments which updated its governing board, amended its by laws, and changed the nature of its organization to become nonprofit, educational. The petitions will be granted and the amendments will be accepted for Section 1.65 purposes only, since these amendments were filed subsequent to the "B" cut-off date.

[4] Neither applicant proposes to have a local studio in Bakersfield. Rather, the applicants each propose to operate essentially as satellites of other noncommercial educational stations it controls. The Commission has traditionally allowed educational broadcast systems to operate in the manner proposed. *See Nebraska Educational Television Commission*, 4 RR 2d 771 (1965). By so doing, the Commission recognizes the realities of public broadcasting funding and the ongoing problems of educational systems in finding the necessary funds to expand and provide noncommercial educational programming to all our citizens. Educational systems must necessarily find ways to get cost efficient programming to as many viewers as possible. Each applicant's proposal, in our judgment, is consistent with this concept. We find, therefore, that each applicant has demonstrated good cause for not locating a main studio in Bakersfield.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if either.

6. IT IS FURTHER ORDERED, That the petition to deny filed by Community TV of Southern California against Valley Public Television, Inc. IS GRANTED to the extent indicated herein and otherwise IS DISMISSED.

7. IT IS FURTHER ORDERED, That Valley Public Television, Inc.'s November 14, 1990, November 22, 1991, July 8, 1992 and December 17, 1992, petitions for leave to amend ARE GRANTED and the accompanying amendments ARE ACCEPTED, for Section 1.65 purposes only, and no comparative benefit will accrue to the applicant as a result of these amendments.

8. IT IS FURTHER ORDERED, That Valley Public Television, Inc. shall submit an amendment providing the information required by Section 73.685(f) of the Commission's Rules, to the presiding Administrative Law Judge and copies each to the Chief, Television Branch, and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 702, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 26, 1993

COMMENTS INVITED ON NEW MEXICO PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for New Mexico (Region 29).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 29 consists of the state of New Mexico. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **May 3, 1993** and reply comments on or before **May 18, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-86 New Mexico-Public Safety Region 29.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-22

In the Matter of

Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act — RM-7990

NOTICE OF PROPOSED RULE MAKING
AND
NOTICE OF INQUIRY

Adopted: February 11, 1993; Released: March 10, 1993

Comment Date: April 19, 1993
Reply Comment Date: May 4, 1993

By the Commission:

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I. INTRODUCTION

1. On October 28, 1992, President Bush signed into law the Telephone Disclosure and Dispute Resolution Act (TDDRA). The purpose of this statute is to "protect the public interest and the future development of pay-per-call technology by providing for the regulation and oversight of the applications and growth of the pay-per-call industry...."[1] The TDDRA requires, *inter alia*, both this Commission and the Federal Trade Commission (FTC) to adopt regulations pertaining to the provision of interstate pay-per-call services.[2] Accordingly, "we initiate this proceeding to establish regulations to implement statutory provisions.

II. BACKGROUND

2. Pay-per-call services (also known as "audiotext" or "900" services) provide telephone users a variety of information services for which they are charged rates different from, and usually higher than, the normal transmission rates charged for ordinary telephone calls. Pay-per-call charges may be assessed on a per minute or flat per call basis.

3. As pay-per-call services have evolved over the past decade, a wide and growing variety of information and services are offered through the audiotext format. Stock market quotes, sports scores, crossword puzzle clues, legal advice, computer product information, horoscopes, and adult-oriented entertainment are but a sampling of the

[1] TDDRA, Pub. L. No. 102-556, preamble.

[2] Title I of the TDDRA adds a new section to the Communications Act providing an explicit statutory framework for this Commission's regulation of the provision of pay-per-call services through common carriers. 47 U.S.C. § 228. In addition, the Commission is directed to provide recommendations to Congress "with respect to the extension of [pay-per-call] regulations . . . to persons that provide, for a per-call charge, data services that are not pay-per-call services." 47 U.S.C. § 228(f)(3). Titles II and III require that regulations regarding pay-per-call services be adopted by the FTC. Title II primarily prescribes advertising and service standards applicable to pay-per-call programs. Under Title III, the FTC must regulate telephone-billed purchases with rules substantially similar to the provisions of the Truth in Lending and Fair Credit Billing Acts, 15 U.S.C. § 1601 *et seq*.

diverse subjects accessible via pay-per-call services. In some instances, sophisticated database programs enable customers to select the precise information they wish to receive. Although prerecorded messages are typically employed to deliver information, pay-per-call programs also offer live and interactive services. Pay-per-call programs provide access to bulletin board services and live chat lines. Charitable and tax-exempt organizations employ audiotext programs for fundraising. Polls can conducted through pay-per-call services with votes tallied according to which pay-per-call number is dialed.

4. Interstate pay-per-call programs are typically accessed by dialing a ten-digit number with a 900 (or, sometimes, 700 or 800) prefix. The usual means of access permits the simultaneous calling by a large number of callers to a single telephone number. Pay-per-call services have also been offered via collect calls to individual subscribers.

5. Information providers (IPs) produce interstate pay-per-call programs and then contract with long distance interexchange carriers (IXCs), either directly or through service bureaus coordinating such arrangements, to obtain telecommunications transmission services and, typically, billing and collection services. IXCs, in turn, have arrangements with local exchange carriers (LECs) who use automatic number identification (ANI) information obtained from the IXC to provide billing and collection for pay-per-call services as part of a subscriber's usual monthly telephone bill. Charges for pay-per-call services are set by the IP, although a portion of such charges are recovered by the IXC and LEC for their transmission and billing and collection services. Some IPs use private billing companies not associated with a telephone company to collect the pay-per-call charges.

6. In recent years, the proliferation of pay-per-call services has given rise to large numbers of consumer complaints regarding various practices associated with such services. Responding to these complaints, the Commission, in 1991, adopted regulations designed to protect consumers from abusive practices which could ultimately threaten their ability to secure basic communications services.[3] These rules: (1) require IXCs to transmit pay-per-call services only if the IP includes an introductory message (or preamble) at the beginning of the call, clearly disclosing the cost of the call, a description of the information, product, or service the caller will receive for the fee charged, the name of the IP, and an opportunity for the caller to hang up without charge; (2) require LECs to offer blocking of 900 services to all subscribers, where technically feasible, and one-time free blocking of 900 services to residential subscribers; (3) prohibit local and long distance companies from disconnecting basic communications service for failure to pay interstate pay-per-call charges; (4) require long distance companies to provide, upon request, the name, address, and customer telephone number for all IPs using their facilities to provide pay-per-call services; (5) prohibit certain automated collect calls; and (6) prohibit generation of broadcast tones that automatically dial a pay-per-call service.

7. The TDDRA adopts several of these requirements as the underpinnings of a regulatory system intended to both promote the legitimate development of pay-per-call services and protect consumers from fraudulent and deceptive practices. In some instances, our rules already satisfy the new statutory mandate. In other cases, we must either adopt new rules or amend existing rules to comply with the precise language or requirements imposed by the TDDRA. The requirements of the TDDRA relevant to this Commission are set forth below along with our proposals to implement such requirements.[4]

III. DISCUSSION

A. Definition of Pay-Per-Call Services

8. The TDDRA defines pay-per-call services more explicitly than do our rules. We propose to change our definition of pay-per-call services to conform with that prescribed by the statute. Accordingly, Section 64.1501 of our proposed rules contains the new definition repeated virtually verbatim from the TDDRA, 47 U.S.C. § 228(i). We also invite commenters to address whether other terms crucial to the application of the TDDRA's requirements should be defined by rule.[5]

B. Limitations on Pay-Per-Call Service and Compliance with Other Federal Pay-Per-Call Regulations

9. Under the TDDRA, any common carrier who assigns pay-per-call numbers must require by contract or by tariff that individual IPs utilizing such numbers comply with the provisions of Titles II and III of the TDDRA, which are within the purview of the FTC, and with any implementing regulations prescribed by the FTC.[6] Further, a carrier is compelled to terminate a pay-per-call program if that carrier knows or reasonably should know that the service is not being offered in compliance with Titles II and III of the TDDRA and related FTC regulations.[7] We propose to eliminate Section 64.710 and instead codify the mandate for compliance with both FCC and FTC regulations by adopting the statutory language. In addition, each common carrier contract or tariff for pay-per-call services should either clearly delineate the terms of the Commission's and the FTC's regulations or reference the publications in which they can be found.[8]

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[3] Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket No. 91-65, Report and Order, 6 FCC Rcd 6166 (1991) (*900 Services Report and Order), recon.*, FCC 93-88 (adopted Feb. 11, 1993).

[4] We propose to create a new subpart in Section 64 of our rules, exclusively for pay-per-call regulations. Thus, those provisions of our existing pay-per-call rules that are being retained will be moved from Subpart G to Subpart 0, Sections 64.1501 *et seq.*

[5] For example, the TDDRA specifically removes from its scope "any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service." 47 U.S.C. § 228(i)(2). Commenters may discuss whether the term "presubscription arrangement" should be explicitly defined by rule and, if so, what that definition should be. It is our view that a presubscription arrangement encompasses only those agreements made by subscribers prior to initiation of a call.

[6] 47 U.S.C. § 228(c)(1).

[7] 47 U.S.C. § 228(c)(2). The Commission's current general compliance requirement mandates that pay-per-call services be offered under the terms and conditions set forth in the Sections 64.711 through 64.716 of the rules, 47 C.F.R. §§ 64.711 - 64.716. 47 C.F.R. § 64.710.

[8] Under Section 61.74 of the rules, "no tariff publication filed with the Commission may make reference to any other tariff

10. In accordance with the TDDRA, we seek comments regarding what particular procedures, if any, should be prescribed to govern a carrier's termination of pay-per-call service for failure to comply with the TDDRA or relevant FTC regulations. We believe that termination of pay-per-call programs operating in violation of the statute or applicable regulations should occur promptly after a short period during which an IP may respond to a carrier's written notification of planned termination. Expedited termination would advance the protective purposes of the TDDRA by ensuring that interstate audiotext programs are being offered in compliance with federal law and regulations.

11. Termination provisions and procedures are typically contained in the tariffs or contracts under which a common carrier provides service. Commenters should address whether it would be sufficient under the TDDRA to simply require that carriers independently delineate such provisions in their tariffs or contracts applicable to pay-per-call services, or whether theCommission must, or should, set specific termination standards and procedures by rule which would then be included verbatim or by reference in a contract or tariff.

C. Preamble Requirement

12. In light of the broad compliance requirement proposed in Section 64.1502 and the TDDRA requirement that the FTC prescribe preamble regulations, we propose to delete the preamble requirement contained in Section 64.711 of our rules. Under the TDDRA, the FTC must adopt regulations incorporating specific service standards that must be observed by IPs in their provision of pay-per-call services. Included in these standards are explicit requirements for preambles that largely mirror the provisions of Section 64.711 of our rules. The regulatory structure for pay-per-call services which this Commission shares with the FTC would be simplified if regulations are not unnecessarily duplicated. Since the FTC is required to adopt rules governing the content and operation of preambles to pay-per-call programs, retention of our preamble requirements would be duplicative and, possibly, confusing. Given the clear preamble requirements included in Title II of the TDDRA and the FTC's obligation to adopt consistent regulations, our separate preamble requirement is no longer necessary to protect consumers. Under the broad compliance requirement of the TDDRA,[9] carriers will continue to be required to enforce preamble standards since they are authorized to assign numbers only for those pay-per-call programs that conform with FTC rules. Again, tariffs should either clearly state these provisions prescribed by the TDDRA and the FTC's implementing rules or specifically reference appropriate FTC rules.

D. Designation of Pay-Per-Call Numbers

13. The TDDRA requires that any services falling within the statutory definition of pay-per-call "be offered only through the use of certain telephone number prefixes and area codes" which are to be "designated by the Commission."[10] These provisions impose new restrictions not contemplated by our existing regulations, and we are particularly interested in receiving comment as to the most efficient and least disruptive way to comply with the number designation requirements.

14. Within the United States and 17 other North American countries, designation of telephone numbers is controlled by the North American Numbering Plan (NANP). Under the NANP, the first three digits of a ten digit telephone number are known as the numbering plan area code or NPA Code. Within that designation, most numbers represent NPA codes assigned to particular geographic areas (area codes). Also included are eight service access codes (SACs) with the number format "N00" (200, 300, 400 . . . 900). The three digit NPA code is followed by a three digit secondary code, known as an office or central office (CO) code. Finally, a telephone number terminates with a four digit station or line number.

15. As administrator of the NANP, Bell Communications Research (Bellcore) assigns all NPA codes. For geographic area codes, office codes are assigned by the LEC providing most of the local exchange service within that particular area code. While the Commission has plenary jurisdiction over the numbering plan within the United States, most numbering plan issues have been resolved through industry negotiations and forums. Thus, Commission involvement has usually been restricted to disputes brought before the Commission for resolution.[11]

16. Most interstate pay-per-call services are probably transmitted via 900 numbers (900-XXX-XXXX). However, some pay-per-call programs are carried over 700 numbers (700-XXX-XXXX).[12] In addition, some primarily intrastate pay-per-call numbers are accessible to interstate callers. In some instances, pay-per-call programs can be reached through long distance dialing sequences employing a ten digit number beginning with an area code. In other instances where local calling areas include parts of more than one state, pay-per-call services may be reached by dialing a seven digit local telephone number which crosses a state line. We estimate that at the present time, local pay-per-call services are available through numbers using between 15 to 20 different central office codes. The most common office code assigned to intrastate pay-per-call services appears to be 976.

17. A substantial number of telephone subscribers are probably aware that services offered through 900 numbers carry charges beyond those assessed for transmission of ordinary long distance calls. Subscribers are much less likely to associate other number sequences with the increased charges applicable to pay-per-call programs. We tentatively conclude that consumers' interests would be served by requiring that 900 is the only service access code

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publication or to any other document or instrument." 47 C.F.R. § 61.74. We propose to adopt an exception to this rule to permit reference to pay-per-call regulations adopted by this Commission and the FTC.

[9] 47 U.S.C. § 228(c)(1).

[10] 47 U.S.C. § 228(b)(5), (c)(2).

[11] The Commission has initiated a proceeding to examine whether and how administration of the NANP could be improved and adjusted to accommodate major changes occurring in the telecommunications industry over the past several years. Administration of the North American Numbering Plan, CC Docket No. 92-237, Notice of Inquiry, 7 FCC Rcd 6837 (1992).

[12] Pay-per-call services are also being offered on 800 numbers. However, in view of the TDDRA's restrictions regarding assignment of 800 numbers (see paras. 29-31, *infra*), it does not appear that such services can be permitted to continue.

that may be used for interstate pay-per-call services. A single service access code should provide an adequate number of dialing sequences to accommodate existing pay-per-call numbers and any reasonably expected demand for such numbers in the foreseeable future. Reassigning all pay-per-call services currently on a 700 service access code to the 900 service access code may cause carriers and IPs some inconvenience and expense. Users may also experience some inconvenience in learning new numbers for familiar services. In our view, however, any such burdens would be outweighed by the public benefit of maximizing the ability of telephone subscribers to easily recognize the nature, and attendant pricing structure, of services being used. Commenters opposing the consolidation of interstate pay-per-call services on the 900 service access code should describe in detail the disruption which they believe would likely flow from such consolidation, and provide specific data to establish the likelihood of significant adverse effects.

18. We also invite commenters to discuss whether public interest concerns support a requirement that intrastate pay-per-call programs be assigned to certain designated office codes.[13] Through such a system, different office codes could be employed for different types of pay-per-call programs, increasing a consumer's ability to distinguish the specific type of pay-per-call service at issue.[14] If such a system is deemed to be of insufficient public benefit or unduly burdensome, should assignment of pay-per-call numbers be restricted to a limited number of easily recognizable central office codes or at least be restricted to those office codes already in service for such purposes? We ask commenters to discuss such issues.

19. We wish to ensure that whatever number designation system is ultimately adopted can be implemented with minimal disruption. Accordingly, during the pendency of this proceeding, we urge carriers to refrain from placing pay-per-call programs on any NPA codes or office codes they are not already using for pay-per-call service.

E. Interruption or Disconnection of Local Exchange or Long Distance Telephone Service Prohibited

20. The Commission's pay-per-call rules already prohibit common carriers from disconnecting or ordering the disconnection of basic communications service for failure to pay interstate pay-per-call charges which under our scheme of third party billing are not common carrier, but instead information service provider, charges. We propose to enlarge this prohibition to reflect the language employed in the TDDRA; specifically, common carriers may not either disconnect or interrupt local exchange service or long distance telephone service for non-payment of pay-per-call charges. Disconnection may imply only final termination of service, whereupon the telephone number of the delinquent subscriber may be reassigned to another customer. The inclusion of the term "interrupt" would clarify that service is also not to be disrupted in any manner, including any action short of actual final disconnection. Likewise, as specified in the TDDRA, we propose to explicitly state that the prohibition against interruption or disconnection applies to both local exchange telephone service and long distance telephone service. These terms set forth in proposed Section 64.1507 would replace the term "basic communications service" which is currently employed in Section 64.714.

21. Apart from these clarifications, we also seek comment on our proposal to extend the prohibition against any disruption of local or long distance telephone service for non-payment of charges to include any collect telephone calls that offer access to audiotext services or group discussions.[15] Although these services may not fall strictly within the definition of pay-per-call if the collect charges are tariffed, the calls resemble pay-per-call services, not traditional collect calls. We note that such calls are prohibited if the caller uses an 800 number (see para. 29, *infra*). Prohibiting disconnection for failure to pay charges for such non-traditional services that may be offered by means other than 800 number origination appears to be consistent with the spirit of the TDDRA.

F. Blocking of and Presubscription to Pay-Per-Call Services

22. The TDDRA requires that, where technically feasible, local exchange carriers must offer their subscribers the option of blocking access to all pay-per-call services, or to certain selected NPA codes or office codes assigned for pay-per-call purposes. Such blocks are to be offered at no charge to all subscribers for a period of 60 days after issuance of the Commission's pay-per-call regulations and to any subscriber taking service at a new telephone number

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[13] Parties should also address whether an office code designation system could be accommodated on 900 numbers without undue disruption. Currently, the second three digits of a 900 number denote the transmitting IXC.

[14] For example, different office codes would be reserved for each distinctive category of pay-per-call programs (*e.g.*, "adult-oriented" entertainment, chat lines, polling).

[15] Collect audiotext calls have generated numerous complaints both to this Commission and state commissions. The charges for these calls often appear to be excessive. See, *e.g.*, Informal Complaint File No. IC-93-02670 (collect call billed by LEC in normal subscriber monthly billing at $14.85 for a three minute call). The called party often apparently does not understand that he or she is receiving a costly call, and, in fact, complainants often assert that they did not take any action to request a call but nevertheless were billed for the collect call. We have previously deferred to the states as to whether LECs may offer to IXCs service whereby a subscriber's telephone service is disconnected for failure to pay long distance charges while we have preempted state authority to regulate the rates LECs charge for such disconnection service. Detariffing of Billing and Collection Services, Report and Order, 102 FCC 2d 1150, 1176-77 (1986), *recon. denied* 1 FCC Rcd 445, (1986). *See also* Public Service Commission of Maryland, 2 FCC Rcd 1998 (1987), *aff'd on review* 4 FCC Rcd 4000 (1989), *aff'd sub. nom.* Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (1990). Here, however, we believe a departure from our prior policy may be warranted because of the specific problems associated with such non-traditional service. The abuses that we have seen with respect to collect audiotext calls -- which often are of an adult-oriented nature -- lead us now to propose a federal prohibition on disconnection of a subscriber's telephone service for nonpayment of charges for such calls. We are also inviting comment on whether to prohibit carrier billing for these services. See para. 36, *infra*. If that prohibition is adopted, we need not reference collect audiotext calls in our prohibition against disconnection. We are proposing to amend our existing restrictions concerning automated collect pay-per-call calls to cover any audio information services or simultaneous voice conversation services billed to the subscriber on a collect basis. *See* 47 C.F.R. § 64.715 and proposed § 64.1505, Appendix.

for a period of 60 days after the new number is effective. Additional blocks or those executed outside the 60 day time frame are to be offered for a "reasonable" charge. Finally, where the Commission determines that it is economically and technically feasible, LECs must offer the option of presubscribing to or blocking only specific pay-per-call services.

23. Although the basic blocking requirement included in the TDDRA is also contained in our rules, the statute specifies blocking options which are in some instances more generous and in some instances less generous to consumers. For instance, whereas the TDDRA requires that free blocking be made available to all telephone subscribers, our rules extend the free block only to residential subscribers. Separately, whereas our rules impose no time limit on a residential subscriber's exercise of the one-time free blocking option, the TDDRA requires only that free blocking be available for a period of 60 days after the issuance of our regulations or after new service is initiated.

24. We propose to change our rules to reflect the specific blocking requirements of the TDDRA. However, we seek comment on the feasibility of providing these selective options using existing technology.

25. Both our rules and the TDDRA impose blocking requirements only where technically feasible. First, subject to technical feasibility, the TDDRA requires LECs to offer blocking "to all, or to certain specific, prefixes or area codes used by pay-per-call services." Second, the statute also requires LECs to offer the blocking of or presubscription to specific pay-per-call services if the Commission determines that such action is technically and economically feasible.

26. In the proceeding which established existing rules pertaining to pay-per-call services, the Commission gathered extensive comment regarding the technical feasibility and proper extent of blocking. In light of the weight of these comments, the Commission concluded that technical considerations justified limiting the blocking option to only those pay-per-call services offered on the 900 exchange and only on an across-the-board basis.[16] We also recognized that in some areas, existing switches might not have the capability to accomplish any blocking of 900 services from individual subscriber numbers. In setting a standard for technical feasibility, we declined to impose a requirement that the LECs accelerate their purchases of new equipment to comply with blocking regulations. Instead, blocking of the entire body of 900 services by individual subscriber number is required when it can be accomplished through a LEC's existing equipment.[17]

27. We seek comment regarding the technical and economic feasibility of accomplishing the detailed blocking or presubscription contemplated by the TDDRA and ask commenters to address, in particular, what standards should be employed to determine technical and economic feasibility. Commenters should also address whether, and in what manner, technical capabilities and number assignments have changed since the Commission limited carriers' blocking obligations to an across-the-board block of 900 services. We are particularly interested in being advised as to the possibility of interstate blocking by office code. If such blocking were determined to be technically and economically feasible, and the office code system of pay-per-call designation discussed in paragraph 18, *supra*, were adopted, subscribers could block only particular categories of pay-per-call programs (*e.g.*, adult-oriented entertainment, chat lines). Assuming technical feasibility, commenters should address the relative costs and benefits of such a system.

28. We also ask commenters to consider whether the LECs should be required to include the rates and regulations governing blocking in their interstate end-user tariffs filed with the Commission.[18] The TDDRA establishes uniform minimum obligations carriers must adhere to in providing blocking services for interstate pay-per-call numbers indicating some need for national uniformity for minimum standards. In addition, services which are associated with interstate tariffs are normally tariffed in federal tariffs. We seek comment as to whether the TDDRA's blocking service obligations should be included in interstate end-user tariffs. Parties should discuss whether such a requirement would either promote uniformity or unduly interfere with state regulatory systems. We specifically request comment on whether a dual federal/state tariffing procedure is workable and the degree to which the Commission should defer to state blocking requirements different from those imposed in the TDDRA.

G. Restrictions on the Use of 800 Numbers for Pay-Per-Call and Other Audiotext Services

29. The TDDRA directs the Commission to establish rules severely constraining the use of 800 numbers -- or any other number "advertised or widely understood to be toll free" -- for pay-per-call purposes. Specifically, such

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[16] *900 Services Report and Order*, 6 FCC Rcd at 6176. Whereas our rules restrict a LEC's blocking obligation to an across-the-board block of all 900 services, the TDDRA raises the possibility that subscribers might obtain either blocking of or presubscription to only selected pay-per-call numbers. However, the likely impossibility of accomplishing blocking of or presubscription to individual pay-per-call services, either currently or in the near future, was recognized by the Senate committee reporting on a predecessor bill pertaining to pay-per-call services. *See* Report of the Senate Committee on Commerce, Science, and Transportation on S. 1579, 900 Services Consumer Protection Act of 1991. Oct. 19, 1991. ("[T]he Committee recognizes that no telephone company has the technology today to permit subscribers to selectively block access to specific 900 services. Accordingly, the Committee recognizes that this option may not be available to subscribers for some time.") Although the Senate bill was not enacted, numerous provisions of that original bill, including the blocking requirement, were incorporated into the TDDRA.

[17] *900 Services Report and Order*, 6 FCC Rcd at 6174. We recently determined that the LEC originating a 900 services call is unable to determine whether the call is interstate or intrastate, and thus it is unable to identify and block 900 calls on a jurisdictional basis. Petition for an Expedited Declaratory Ruling Filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc., FCC 93-45 (released January 22, 1993).

[18] Section 228((c)(4)(B) states that carriers are not precluded from filing blocking rates and regulations in their interstate tariffs. We declined to require tariffing at the interstate level in the *900 Services Report and Order*, because (1) the record reflected that technology could not distinguish between interstate and intrastate 900 calls and (2) states had made substantial progress in imposing blocking requirements. 6 FCC Rcd at 6176.

numbers may not be used in any manner that would result in (1) charges being incurred upon completion of a call; (2) connection of the caller to a pay-per-call service; (3) charges being incurred for any information conveyed during the call unless the caller either has a preexisting agreement authorizing such charges or discloses a credit or charge card number during the call; or (4) the caller being called back collect to receive audio information services or simultaneous voice conversation services.[19] These limitations must be added to the Commission's rules. We propose to adopt them virtually verbatim.[20]

30. We ask commenters to consider whether additional restrictions on the use of 800 numbers beyond those contained in the TDDRA should be adopted to guard against deceptive practices. For instance, we understand that some 800 callers have received credit card charges after disclosing a credit card number, ostensibly for the sole purpose of verifying their credit worthiness. Our proposed rule provides that charges for information conveyed during an 800 call may not be incurred unless the caller both discloses a credit card number and authorizes a charge to that number during the call. We also seek comment to discern the proper scope of the terms "credit card" and "charge card" and whether any exclusions or additions to the usual definitions should be incorporated in our rules. In particular, we ask commenters to address whether a telephone calling card would be deemed a charge card for purposes of this section, and, if so, whether its designation as such enlarges the potential for abuse or circumvention. We are also interested in commenters' views as to whether the TDDRA's 800 number restrictions encompass the IXCs' establishment of 800 numbers for use by subscribers in making calling card calls.

31. On April 30, 1992, the 900 Number Subcommittee of the Consumer Protection Committee of the National Association of Attorneys General (NAAG) and 34 states filed a Petition for Clarification and Modification of the Commission's pay-per-call regulations seeking a ruling that would limit the use of 800 numbers for pay-per-call purposes. The Commission determined that the NAAG Petition should be treated as a petition for rule making and, accordingly, instituted a proceeding (RM-7990) and solicited comment on pertinent issues presented by the petitioners: (1) whether pay-per-call rules apply when such services are offered via 800 numbers and (2) whether carriers should be prohibited from providing 800 numbers for services which bill customers through the use of tone-generation technology, automatic number identification, or billing detail information.[21] We will incorporate the record compiled in RM-7990 into our larger rule making effort undertaken here in response to the TDDRA. Thus, although we ask commenters to pay special attention to the manner in which statutory provisions relating to the use of 800 numbers differ from the proposals made by NAAG, parties need not repeat the views contained in their comments submitted in RM-7990.

H. Disclosure and Dissemination of Pay-Per-Call Information by Common Carriers

32. Section 64.712 of the Commission's rules currently requires carriers providing interstate transmission for pay-per-call services to provide to consumers, upon request and free of charge, the name, address, and customer service telephone number of any information providers who receive transmission services from the carrier. A carrier may engage another entity such as a service bureau to fulfill this obligation.

33. The TDDRA imposes some additional disclosure requirements upon common carriers who assign numbers for pay-per-call purposes. In particular, along with the information already required under our rules, the TDDRA specifies that carriers must, upon request, provide a list of telephone numbers for each pay-per-call service for which that carrier has assigned a telephone number, and a short description of each such service.[22]

34. Further procedures for information disclosure and dissemination are mandated for carriers who, in addition to assigning pay-per-call numbers, provide billing and collection services to IPs offering pay-per-call programs.[23] These carriers must (1) establish local or toll free telephone numbers to answer questions and provide information on subscribers' rights and obligations with respect to use of pay-per-call services and (2) provide[24] to each subscriber[25] within 60 days after the issuance of final regulations, a disclosure statement explaining the rights and obligations of both the subscriber and the carrier with respect to the use of and payment for pay-per-call services, including a subscriber's right not to be billed[26] and to obtain blocking of pay-per-call services in the manner set by our rules. Names and mailing addresses of information providers utilizing the carrier's facilities to offer pay-per-call services are to be available over a local or toll free number.[27]

35. The TDDRA's requirements that common carriers make available various types of information pertaining to the pay-per-call services they carry are clear, and we propose to adopt Section 64.1509 to include these specific statutory prescriptions. We seek comment as to whether common carriers should be required to make additional categories of pay-per-call information available to requesters or take steps beyond those set forth in the statute to promote consumer awareness.

I. Billing and Collection

36. In prescribing procedures that must be followed by common carriers who assign telephone numbers for pay-per-call programs and provide billing and collection ser-

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[19] 47 U.S.C. § 228(c)(6).

[20] Adoption of these provisions may require IXCs to alter their tariffs or contracts governing the provision of 800 services.

[21] Public Notice, 7 FCC Rcd 3390 (1992).

[22] 47 U.S.C. § 228(c)(2).

[23] The TDDRA sets certain standards with respect to the format and content of bills issued by common carriers for pay-per-call services. These requirements are discussed below at ¶ ¶ 36-37.

[24] An affected carrier (generally an IXC) can provide required information itself or through contract with any local exchange carrier that provides billing and collection services to that carrier.

[25] Carriers are obligated to provide pay-per-call disclosure statements to all new subscribers and to all subscribers obtaining service at a new location.

[26] Carriers are prohibited from billing subscribers for pay-per-call services which the carrier knows, or reasonably should be expected to know, are not being offered in accordance with the provisions of the TDDRA and the FTC's implementing regulations.

[27] 47 U.S.C. § 228(d)(2), (3).

vices for IPs producing such programs, the TDDRA begins with a prohibition against billing for any service that such a carrier knows or reasonably should know has not been provided in compliance with provisions governing practices of IPs, which are contained in Title II of the statute and are to be codified by the FTC.[28] This Commission is also authorized to impose any other carrier billing restrictions that it deems necessary to protect consumers from abusive practices. In light of the numerous complaints that we have received regarding collect audiotext calls, we seek comment on, but do not propose, a prohibition against carrier billing for any interstate collect calls that offer or initiate audiotext or simultaneous voice conversation programs, and whether such a prohibition is technically feasible. See para. 21, *supra*.

37. The TDDRA requires that bills for pay-per-call services issued by a common carrier must display the toll-free number available to parties seeking information regarding pay-per-call services offered through that carrier. Charges for such services must be shown on the bill separately from local and long distance telephone charges. We are also proposing that if we do not prohibit carrier billing for collect audiotext calls, such charges be included in the separate billing for pay-per-call services. Further, the statute directs that for each pay-per-call charge made, the bill must show the amount of the charge; the date, time and duration of the call being charged; and the type of service being charged for[29] We seek comment whether any additional information should be included in telephone bills containing pay-per-call charges. Should the name and other information about the IP be included on telephone bills containing pay-per-call charges? Should such bills include a statement informing the billed party that even if charges for pay-per-call services are removed by a carrier from a bill, an IP may pursue collection either on its own or through other private entities? For example, should both an explanation of the steps necessary to dispute pay-per-call charges and a statement that local exchange and long distance telephone service cannot be interrupted or terminated for failure to pay such charges be mandatory on telephone bills where the charges appear? Parties should address whether such measures, which extend beyond the requirements of the TDDRA, would serve consumer interests. Parties may also identify any problems with such requirements. Our goal is to ensure, first, that subscribers are educated as to their basic rights with respect to pay-per-call programs and charges and, second, that they are able without unreasonable effort to obtain the information necessary to assert such rights.

J. Forgiveness of Charges and Refunds

38. Under Section 228(f)(1), the Commission must set procedures "to ensure that carriers and other parties providing billing and collection services with respect to pay-per-call services provide appropriate refunds to subscribers who have been billed for pay-per-call services pursuant to programs that have been found to have violated this section or such regulations [prescribed under the section], any provision of, or regulations prescribed pursuant to, title II or III of the [TDDRA], or any other Federal law."

39. We are proposing a rule stating that common carriers must forgive charges or issue refunds for charges associated with pay-per-call services when either the Commission or the carrier, upon written or oral protest or on its own motion, determines that a pay-per-call program has been conducted in violation of federal law or federal pay-per-call regulations.[30] In addition, to address those situations where non-carriers provide pay-per-call billing and collection services, we propose that IXCs assigning pay-per-call numbers be required to include in their tariffs or contracts with IPs provisions specifying that IPs, and/or their billing agents, have in place similar procedures for issuance of refunds or forgiveness of charges. We invite commenters to suggest whether more specific provisions governing refunds should be added. We ask commenters to address the scope of violative behavior that would trigger a refund. Specifically, in investigating whether a refund should be issued, what is the extent of a carrier's obligation to determine compliance with all federal laws, not just those directly relevant to pay-per-call programs? As a practical matter, what standard should be applied to establish that a violation has occurred? It appears that an FTC finding of violation is adequate to initiate refund action by this Commission, but, for example, would a finding of non-compliance with federal regulations by a state attorney general be sufficient to establish a violation and initiate refunds?

K. Protection Against Nonpayment of Legitimate Charges

40. The TDDRA directs the Commission to "identify procedures by which common carriers and providers of pay-per-call services may take affirmative steps to protect against nonpayment of legitimate charges."[31] Congress clearly has been concerned that carriers and information providers are able to protect themselves from unscrupulous subscribers who might knowingly use pay-per-call services yet invoke the TDDRA's protective billing and refund provisions to avoid paying legitimate charges.[32] We propose to specify that none of the provisions of our proposed pay-per-call rules precludes a common carrier or information provider from blocking or ordering the blocking of their pay-per-call programs from numbers assigned to subscribers who have incurred, but not paid, legitimate pay-per-call charges.[33] We believe that such a provision is the simplest and least intrusive way to ensure that carriers and

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[28] 47 U.S.C. § 228(d)(1)(A).

[29] 47 U.S.C. § 228(d)(4).

[30] The normal 18-month record retention requirement imposed on common carriers under Part 42 of our rules would apply to all subscriber records showing pay-per-call charges. 47 C.F.R. § 42.6. Thus, refund requests and billing disputes would have to be initiated within that time frame, unless the carrier were directed, at the beginning of a complaint process, to retain the records until final resolution.

[31] 47 U.S.C. § 228(b)(4).

[32] *See* Report of the Senate Committee on Commerce, Science, and Transportation on S. 1579, 900 Services Consumer Protection Act of 1991. Oct. 19, 1991. In discussing a predecessor pay-per-call bill substantially similar in relevant part to the TDDRA, the Committee stressed that "if one customer has chronic complaints about calls to 900 services, then the telephone company can block calls to 900 services from that subscriber's telephone. The Committee does not endorse consumer fraud nor does it intend by this legislation to inadvertently encourage consumer fraud in this area."

[33] *See 900 Services Report and Order*, 6 FCC Rcd at 6177.

IPs can take affirmative action to prevent fraudulent use of their services. Nonetheless, we seek comment whether a statement simply recognizing the right of a carrier or IP to order or implement involuntary blocking complies with the mandate to "identify procedures" for affirmative action or whether some more detailed rule is required.

L. Recovery of Costs

41. Under the TDDRA, common carriers are permitted to recover the costs of complying with the statute and the Commission's implementing regulations but are prohibited from recovering any such costs from local or long distance ratepayers."[34] Common carriers may incur compliance-related costs associated with pay-per-call services through free blocking, information dissemination programs, billing procedures, and refund requirements.[35] These costs are referred to herein are "restricted costs."

42. The Commission considered recovery of costs associated with free blocking in CC Docket No. 91-65. In the *900 Services Report and Order*, the Commission observed that LECs had been recovering blocking costs from IXCs, from subscribers who pay a blocking fee, or from ratepayers generally. In declining to disrupt state-mandated recovery procedures, the Commission observed that those procedures appeared to work satisfactorily in the 31 states that at that time mandated one-time free blocking.[36] In addition, we found no record evidence indicating that one-time blocking costs were significant. We thus concluded that "recovery of all costs of the free blocking of 900 services for residential subscribers at the federal level, with cost recovery of other blocking pursuant to state procedures, would inject undue complexity into the LECs' accounting for these costs."[37]

43. However, whatever complexity might result from federal cost recovery mechanisms, it is clear that the TDDRA forbids any costs associated with compliance with pay-per-call regulations being borne by local exchange and long distance ratepayers. There are two issue to be resolved in meeting this requirement: how are restricted costs to be identified and how are those costs to be excluded from local and long distance rates? In this regard, commenters should discuss precisely how the LECs' and IXCs' pay-per-call compliance costs can be isolated.[38] Should the standard be incremental, fully distributed, or some other form of costs? Assuming that such costs can be effectively isolated, it is unclear how we can satisfy the TDDRA's cost recovery provisions since (a) the LECs who perform some of the compliance activities required under TDDRA do not have direct business relationships with the IPs, and (b) LECs and IXCs providing pay-per-call services may not be regulated on a cost basis (but rather under incentive-price provisions) or are subject to streamlined regulation.

44. Among the recovery mechanisms commenters may discuss are designation of a discrete rate element, imposition of a surcharge on 900 access or other charges on IXCs and IPs, referral of separation implications to a Federal-State Joint Board and adoption of Part 69 rules, and addition of a new Part 32 account. We seek comment as to how these or other means could be used to recover costs associated with free blocking and other activities involving consumer awareness, billing, and refunds which either IXCs or LECs must undertake to comply with the TDDRA. We note that under price caps, incurrence of such costs by LECs would not necessarily affect access rates charged to IXCs or associated interstate rates paid by the end-user, because access rates are uncoupled from costs. However, to the extent that restricted costs are already being incurred, they would need to be removed from the price cap rates of the LECs and AT&T through an exogenous adjustment. For rate of return regulated companies, exclusion of restricted costs in Part 69 accounts would have a direct effect on access rates, since rates are based on costs.

45. When pay-per-call compliance costs are incurred by IXCs, the IXCs could, in turn, be required to add a premium on their transmission rates to IPs to ensure that such costs are recovered from IPs and not general ratepayers. Such a system, however, would not cover costs properly designated as intrastate. We are particularly concerned with the extent to which the TDDRA requires the Commission to ensure that pay-per-call charges are not passed on to general ratepayers through intrastate charges. One option which would eliminate the possibility of inclusion of such costs in local charges would be to revise Parts 32 and 69 of our rules to assign all pay-per-call costs and revenues to the interstate jurisdiction. Although more simple than some other possible options, this approach could have serious consequences on state regulatory systems. If pay-per-call compliance costs must be separated between the interstate and intrastate jurisdictions, it may be impossible to avoid revision of Part 36 of our rules and the attendant complexity of a Federal-State Joint Board proceeding.[39] As an interim measure, however, a special study could be undertaken to identify and segregate compliance costs.

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[34] 47 U.S.C. § 228 (c)(4), (f)(2).

[35] Although all blocking, whether available to subscribers free or through a one-time charge, will cause carriers to incur "restricted costs," it is the costs associated with free blocking that are primarily at issue here. Fees charged to subscribers will provide an offsetting revenue flow to reduce the amount of restricted costs although it is possible that tariffed blocking rates may not cover their own costs. We recognize that those costs must be associated with the revenues derived from blocking tariffs, and that this issue is related to the way in which we resolve whether blocking tariffs are filed at the state or federal level (see para. 28, *supra*).

[36] *900 Services Report and Order*, 6 FCC Rcd 6176.

[37] *Id.*

[38] We ask the LECs, who have now had over one year of experience in providing blocking to their subscribers, to explain their means of isolating the costs associated with this activity, to quantify such costs, and to specify the proportionate division of those costs between the interstate and intrastate jurisdictions. We also ask the IXCs to estimate both what level of restricted costs they will incur, based on projected 1993 traffic volume, and also what part of restricted costs are recovered from current blocking charges.

[39] Declaring pay-per-call activities nonregulated under Part 64 does not appear to be a valid means of segregating costs since the provision of pay-per-call services involves common carriage. Under the current regulatory system, the LECs' costs of billing pay-per-call services are now presumably passed on to IXCs as a nonregulated activity although we have no means of ensuring that IXCs are not, in turn, imposing such costs on ratepayers generally.

M. Verification of Charitable Status

46. Under the TDDRA any carrier assigning a pay-per-call number to an IP that it knows or reasonably should know is engaged in soliciting charitable contributions must obtain proof of the tax exempt status of any person or organization for which contributions are solicited.[40] We propose to codify this provision by directing carriers to obtain verification that the entity or individual for whom contributions are solicited has been granted tax exempt status by the Internal Revenue Service. This verification requirement could be satisfied most simply by requiring submission of IRS Form 990 which records the grant of tax exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code.[41] Commenters should address whether additional verification standards should be imposed to ensure that consumers are protected against unscrupulous or deceptive solicitations. We understand that some state law enforcement authorities may wish to ensure that solicitations undertaken within their states meet applicable state standards, and we invite comments on the Commission's role in this regard. We ask commenters to address both the desirability and practicality of incorporating into federal pay-per-call regulation a requirement that charitable institutions soliciting contributions through an interstate pay-per-call format demonstrate that they meet the solicitation requirements for each state in which their solicitation may occur.

IV. NOTICE OF INQUIRY REGARDING APPLICATION OF PAY-PER-CALL REGULATIONS TO DATA SERVICES

47. The TDDRA requires the Commission to report to Congress within one year after enactment of the statute as to the desirability of extending pay-per-call regulations to "persons that provide, for a per-call charge, data services that are not pay-per-call services."[42] We are issuing this Notice of Inquiry so that we will have the benefit of various views of interested parties in developing our recommendations to Congress. The range of services encompassed by Section 228(f)(3) is not apparent. Accordingly, we invite parties to describe current data services that are not within the statutory definition of pay-per-call, and identify the costs and benefits that an extension of the regulations would entail. We seek specific information as to whether there are, or are likely to be, abuses in the provision of such data services that could be alleviated by application of pay-per-call regulations. Commenters documenting abuses and supporting the extension of pay-per-call regulations to cover data services not already subject to the TDDRA, should discuss the most efficient and least intrusive means of tailoring regulations to alleviate specific abuses.

V. PROCEDURAL MATTERS

Ex Parte Rules - Non-restricted Proceeding

48. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

49. **Reason for action**. The Commission is issuing this Notice of Proposed Rule Making and Notice of Inquiry to comply with the requirements of the TDDRA and to ensure that consumers are adequately protected from unreasonable practices related to the provision of interstate pay-per-call services.

50. **Objectives**. The objective of this Notice of Proposed Rule Making and Notice of Inquiry is to initiate a proceeding to prescribe regulations consistent with the provisions of the TDDRA and to ensure that consumers are protected from unreasonable practices related to the provision of interstate pay-per-call services.

51. **Legal Basis**. Sections 1, 4(i), 4(j), 201-205, 218 and 228 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 228.

52. **Description, potential impact, and number of small entities affected**. The proposed rules will require that common carriers and entities in the pay-per-call industry provide information that is necessary for consumers to make knowledgeable choices among services. The rules will also help to eliminate certain practices and charges that impair a consumer's ability to make informed choices. Small entities may feel some economic impact due to the proposed consumer education and cost recovery requirements.

53. **Reporting, recordkeeping, and other compliance requirements**. The proposed rules require reporting in the form of the disclosure by pay-per-call service providers to interexchange carriers of certain information regarding their identities and their services.

54. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. We shall consider any alternatives suggested in comments that are consistent with the requirements of the TDDRA and with the public interest obligations imposed by the Communications Act.

55. Comments are solicited. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rule Making and Notice of Inquiry, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq.*

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[40] 47 U.S.C. § 228(c)(5).
[41] 26 U.S.C. § 501(c)(3).
[42] 47 U.S.C. § 228(f)(3).

VI. CONCLUSION

56. The rules proposed are intended to implement the specific statutory requirements of the TDDRA in a manner that will maximize consumers' protection from unfair and unreasonable practices related to the use of interstate pay-per-call services with minimal disruption to common carriers and providers of lawful and legitimate pay-per-call services. Through these rules, we seek to foster a marketplace environment in which providers of per-per-call services compete based on the merits of their services rather than by capitalizing on consumer confusion and lack of knowledge. In submitting comments on these proposed rules, parties should note our particular interest in information as to the most efficient and least disruptive and burdensome means of ensuring that statutory prescriptions are met. Commenters should pay special attention to questions regarding economic and technical feasibility and recovery of costs. Finally, we encourage interested parties to participate in the parallel rule making proceeding being conducted by the FTC in accordance with Titles II and III of the TDDRA.

VII. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218 and 228 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 228, that a NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing amendment of 47 C.F.R. Part 64 as set forth in the Appendix.

58. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218 and 228 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 228, that a NOTICE OF INQUIRY IS ISSUED, soliciting comment on the extension of pay-per-call regulations to data services that do not fall within the statutory definition of pay-per-call services.

59. IT IS FURTHER ORDERED, that the Petition filed by the National Association of Attorneys General IS GRANTED, to the extent set forth herein.

60. IT IS FURTHER ORDERED, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, that all interested parties may file comments on the matters discussed in this Notice and on the proposed rules contained in the Appendix by April 19, 1993. Reply comments are due by May 4, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 64 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. The authority citation for Part 64 is proposed to be amended to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228 unless otherwise noted.

2. Subpart G of Part 64 is proposed to be amended by deleting Sections 64.709 through Section 64.716, inclusive.

3. Subpart O of Part 64 is proposed to be added as follows:

§ 64.1501 Definition of Pay-Per-Call Services.

(a) The term "pay-per-call services" means any service

(1) in which any person provides or purports to provide

(A) audio information or audio entertainment produced or packaged by such person;

(B) access to simultaneous voice conversation services; or

(C) any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;

(2) for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and

(3) which is accessed through use of a 900 telephone number.

(b) Such term does not include directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate, or any service the charge for which is tariffed, or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service.

§ 64.1502 Limitations on the Provision of Pay-Per-Call Services.

Any common carrier assigning to a provider of pay-per-call service a telephone number shall require, by contract or tariff, that such provider comply with the provisions in this subpart and of titles II and III of the

Telephone Disclosure and Dispute Resolution Act and the regulations prescribed by the Federal Trade Commission pursuant to those titles.

§ 64.1503 Termination of Pay-Per-Call Programs.

Any common carrier assigning to a provider of pay-per-call service a telephone number shall specify by contract or tariff that pay-per-call programs not in compliance with § 64.1502 shall be promptly terminated following notice to the information provider.

§ 64.1504 Restrictions on the Use of 800 Numbers.

Common carriers shall prohibit, by tariff or contract, the use of any telephone number beginning with an 800 service access code, or any other telephone number advertised or widely understood to be toll free, in a manner that would result in

(a) the calling party being assessed, by virtue of completing the call, a charge for the call;

(b) the calling party being connected to a pay-per-call service;

(c) the calling party being charged for information conveyed during the call unless the calling party has a pre-existing agreement to be charged for the information or discloses a credit or charge card number and authorizes a charge to that credit or charge card number during the call; or

(d) the calling party being called back collect for the provision of audio information services or simultaneous voice conversation services.

§ 64.1505 Restrictions on Collect Telephone Calls.

No common carrier shall provide transmission services billed to the subscriber on a collect basis for audio information services or simultaneous voice conversation services unless the called party has taken affirmative action clearly indicating that it accepts the charges for the collect service.

§ 64.1506 Number Designation.

Any common carrier assigning telephone numbers shall limit such assignments for interstate pay-per-call programs to telephone numbers beginning with a 900 service access code.

§ 64.1507 No Disconnection or Interruption of Service for Failure to Remit Pay-Per-Call or Similar Service Charges.

No common carrier shall disconnect or interrupt in any manner, or order the disconnection or interruption of, a telephone subscriber's local exchange or long distance telephone service as a result of that subscriber's failure to pay interstate pay-per-call service charges or charges for interstate collect calls providing audio information services or simultaneous voice conversation services.

§ 64.1508 Blocking Access to 900 Service.

(a) Local exchange carriers must offer to their subscribers, where technically feasible, an option to block interstate 900 services. Blocking is to be offered at no charge to

(1) all telephone subscribers for a period of 60 days after the effective date of these regulations; and

(2) any subscriber who subscribes to a new telephone number for a period of 60 days after the new number is effective.

(b) For blocking requests not within the one-time option or outside the 60 day time frames, and for unblocking requests, local exchange carriers may charge, pursuant to their interstate end-user tariffs, a reasonable one-time fee. Requests by subscribers to remove 900 service blocking must be in writing.

§ 64.1509 Disclosure and Dissemination of Pay-Per-Call Information.

(a) Any common carrier assigning a telephone number to a provider of pay-per-call services shall make readily available, at no charge, to Federal and State agencies and all other interested persons

(1) a list of the telephone numbers for each of the pay-per-call services it carries;

(2) a short description of each such service;

(3) a statement of the total cost or the cost per minute and any other fees for each such service; and

(4) a statement of the pay-per-call service provider's name, business address, and business telephone number.

(b) Any common carrier assigning a telephone number to a provider of pay-per-call and offering billing and collection services to such provider shall

(1) establish a local or toll-free telephone number to answer questions and provide information on subscribers' rights and obligations with regard to their use of pay-per-call services and to provide to callers the name and mailing address of any provider of pay-per-call services offered by that carrier; and

(2) provide to all its telephone subscribers, either directly or through contract with any local exchange carrier providing billing and collection services to that carrier, a disclosure statement setting forth all rights and obligations of the subscriber and the carrier with respect to the use and payment of pay-per-call services, including the right of a subscriber to obtain blocking in accordance with § 64.1507 and, under § 64.1509(a), not to be billed. Such disclosure statements must be forwarded to

(i) all telephone subscribers within 60 days after issuance of these regulations;

(ii) all new subscribers; and

(iii) all subscribers requesting service at a new location.

§ 64.1510 Billing and Collection of Pay-Per-Call Charges.

Any common carrier assigning a telephone number to a provider of pay-per-call services and offering billing and collection services to such provider shall

(a) ensure that a subscriber is not billed for pay-per-call services that such carrier knows or reasonably should know were provided in violation of the regulations set forth in this subpart or prescribed by the Federal Trade Commission pursuant to titles II or III of the TDDRA or any other federal law.

(b) in any billing to telephone subscribers that includes charges for any pay-per-call service or collect call providing audio information service or simultaneous voice conversation service

(1) display any charges for pay-per-call services or collect audiotext services in a part of the bill that is identified as not being related to local and long distance telephone charges;

(2) specify, for each pay-per-call or collect audiotext charge made, the amount of the charge, and the date, time, and duration of the call; and

(3) identify the local or toll-free number established in accordance with § 64.1508(b)(1).

§ 64.1511 Forgiveness of Charges and Refunds.

(a) Any carrier providing billing and collection services to a provider of pay-per-call services or collect audiotext services shall forgive pay-per-call charges or issue refunds for such charges when the Commission or that carrier, upon written or oral protest or on its own motion, determines that a pay-per-call program or collect audiotext call has been offered in violation of federal law or the regulations that are either set forth in this subpart or prescribed by the Federal Trade Commission pursuant to titles II or III of the TDDRA. Carriers shall observe the record retention requirements set forth in 47 C.F.R. § 42.6 except that relevant records shall be retained by carriers beyond the Part 42 requirement when a complaint is pending at the time the specified time period expires.

(b) Any carrier assigning a telephone number to a provider of pay-per-call services but not providing billing and collection services to such provider shall, by tariff or contract, require that the provider and/or its billing and collection agents have in place procedures whereby charges are forgiven and refunds issued for charges incurred in connection with pay-per-call programs that have been offered in violation of federal law or the regulations that are either set forth in this subpart or prescribed by the Federal Trade Commission pursuant to titles II or III of the TDDRA.

§ 64.1512 Involuntary Blocking of Pay-Per-Call Services.

Nothing in this subpart shall preclude a common carrier or information provider from blocking or ordering the blocking of its pay-per-call programs from numbers assigned to subscribers who have incurred, but not paid, legitimate pay-per-call charges.

§ 64.1513 Verification of Charitable Status.

Any common carrier assigning a telephone number to a provider of pay-per-call services that the carrier knows or reasonably should know is engaged in soliciting charitable contributions shall obtain verification that the entity or individual for whom contributions are solicited has been granted tax exempt status by the Internal Revenue Service.

§ 64.1514 Generation of Signalling Tones.

No common carrier shall assign a telephone number for any pay-per-call service that employs broadcast advertising which generates the audible tones necessary to complete a call to a pay-per-call service.

§ 64.1515 Recovery of Costs.

No common carrier shall recover its cost of complying with the provisions of this subpart from local or long distance ratepayers.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-65

In the Matter of

Policies and Rules Concerning
Interstate 900 Telecommunications
Services

ORDER ON RECONSIDERATION

Adopted: February 11, 1993; Released: March 10, 1993

By the Commission:

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I. INTRODUCTION

1. In this *Order on Reconsideration*, we affirm, with one minor change, our regulations governing pay-per-call services and clarify several portions of the *Report and Order* in which we adopted those rules.[1] Specifically, we retain a preamble requirement on all but nominally-priced pay-per-call services, but: (a) amend the rules to provide that the preamble need not be applied to non-verbal programs; (b) clarify that the ban on commencement of charges before the end of the preamble does not apply to specific charges assessed by carriers on information providers (IPs) or interexchange carriers (IXCs); and (c) clarify that the carrier responsible for rating pay-per-call messages is responsible for ensuring that billing to callers does not begin before the end of the preamble. Finally, we prohibit local exchange carriers (LECs) from bundling blocking of 900 services with blocking for the 700 exchange, and clarify that our rules do not apply to local information services which are offered in a local calling area that crosses state lines.

II. BACKGROUND

2. On September 26, 1991, the Commission adopted rules to protect consumers who access pay-per-call services.[2] The rules provide that the IXCs, as part of their interstate pay-per-call transmission service offerings, must require that price, product or service identification and the name of the information provider be given before a consumer incurs a charge for a pay-per call transaction. We exempted flat rate calls with a charge of $2.00 or less per call from the preamble requirement and required a special parental permission warning on all programs "aimed at or likely to be of interest to children under eighteen." We also preempted state preamble requirements on 900 services with jurisdictionally mixed traffic after finding that the traffic to a single 900 number could not be jurisdictionally sorted. Additionally, we required that each IXC provide, on request, the name, address and customer service telephone number of any information provider of pay-per-call services over the IXC's network. We also required that LECs offer the option of blocking all 900 calls from a subscriber's telephone, where technically feasible, and that residential subscribers might obtain this feature at no charge on a one-time basis. We prohibited disconnection of basic telephone service for failure to pay interstate pay-per-call service charges. We prohibited automated collect telephone calls unless the called party takes affirmative action clearly indicating that it accepts the charges for the collect pay-per-call service, and banned pay-per-call services which use broadcast advertising which generates the signal tones necessary to complete a pay-per-call communication. Finally, we required automated dialing devices which deliver a recorded message to the called party to release the called party's line promptly and in accordance with current industry standards.

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[1] Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket No. 91-65, Report and Order, 6 FCC Rcd 6166 (1991) (*Report and Order*).

[2] Section 64.709 of the rules defines pay-per-call services as: "telecommunications services which permit simultaneous calling by a large number of callers to a single telephone number and for which the calling party is assessed, by virtue of completing the call, a charge that is not dependent on the existence of a presubscription relationship and for which the caller pays a per-call or per-time-interval charge that is greater than, or in

3. Ten parties[3] filed petitions for reconsideration of the *Report and Order*.[4] Also, three parties filed petitions for waiver of the preamble rules.[5] On December 3, 1991, NAIS filed a "Petition for Reconsideration and/or Clarification" and a "Motion to Accept Late Filed Petition for Reconsideration or, In the Alternative, Comments on Petitions for Reconsideration."[6] NAIS filed its Petition and Motion one day after the statutory deadline for filing a petition for reconsideration. NAIS argues that the Commission should accept its petition for reconsideration, citing *Greater Boston Television Corporation v. FCC* [7] and *Meredith Corp. v. FCC*.[8] Neither of the cases cited by NAIS supports the proposition that we have the authority to waive the statutory thirty day time limit for filing petitions for reconsideration.[9] Accordingly, we decline to grant NAIS's motion and will not accept its late-filed pleading as a petition for reconsideration. However, we will consider NAIS's petition to be an opposition to or comments on the petitions for reconsideration to the extent that it addresses issues on which other parties request reconsideration.

4. During the pendency of the subject petitions, President Bush signed the Telephone Disclosure and Dispute Resolution Act (TDDRA).[10] The TDDRA requires the Commission and the Federal Trade Commission (FTC) to adopt, by July 25, 1993, rules governing pay-per-call services. In a separate *Notice of Proposed Rulemaking* in CC Docket 93-22 adopted simultaneously with this order, we have proposed further revisions to our pay-per-call rules to implement the TDDRA.[11] As appropriate, we will also consider the new statutory requirements in resolving the reconsideration issues herein.

III. DISCUSSION

A. Section 64.711 - Preamble

1. Scope of Exemption for Nominally Priced Programs

5. **Statement of the Issue:** Section 64.711(a) of the rules does not require a preamble for pay-per-call programs with a flat-rate charge of $2.00 or less. However, a preamble is required on usage sensitive programs, no matter how inexpensive. Parties raise the issues of whether the threshold amount for exemption from the preamble should be raised and whether the exemption should be extended to usage sensitive programs.

6. **Positions of the Parties:** Generally, petitioners request an expansion of the exemption from the preamble requirement as to both the threshold amount and the inclusion of usage sensitive programs. AT&T and COAC advocate modification of the threshold to include all programs, both flat rate and usage sensitive.[12] COAC argues that the exemption should be expanded to apply to programs with less than $5.00 in average total charges and less than $1.00 per minute for usage sensitive programs. COAC argues that if the threshold for exemption is not changed, "an overwhelming number of information providers may not be able to continue such low cost programs."[13] COAC claims that the preamble rule, as currently written, would raise the IP's costs by approximately twenty percent, result in increased costs and decreased availability of programming for consumers and deprive callers of immediate access to information, which is a major benefit of the service. Both NAIS and COAC recommend that the determination of whether a usage sensitive program is under the per-call limit should be made based on the historical average of calls to that program. COAC also asks that the threshold amount be periodically adjusted for inflation.[14] NAIS urges that the threshold price be raised to $3.00 per call and applied to both flat-rate and usage sensitive calls. Further, NAIS states that the Commission's *Report and Order* fails to provide a justification for excluding usage sensitive calls costing less than $2.00. IIA states that our rules provide an incentive for IPs to bill on a flat-rate, rather than a usage sensitive basis, which may result in higher charges to consumers.[15]

7. **Decision:** We are not persuaded that the record in this proceeding supports a broad rule exempting low cost usage sensitive programs from the preamble requirement. Petitioners have not demonstrated how such an exemption would meet our concern that the total per-call charge for a program without a preamble should not exceed a nominal

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addition to, the charge for transmission of the call."

[3] Appendix A lists the parties participating and provides the abbreviations we use throughout this *Order*.

[4] In its petition, COAC requested that the Commission stay those rules for which it had requested reconsideration. That request is procedurally defective because it did not comply with the requirements of Section 1.44(e) of the Commission's rules. Accordingly, that request is dismissed. On February 26, 1992, NAAG filed a "Motion to Accept Responsive Pleading" and an unauthorized pleading in response to AT&T's Reply. These pleadings were submitted after all filing deadlines in the reconsideration process had passed. However, NAAG requested that we consider its pleading because the necessity to respond was not apparent until AT&T's Reply was filed and because of the extended time that NAAG requires to get pleadings prepared and approved. For these reasons and because of the narrowly focused nature of NAAG's pleading (*see* ¶ ¶ 20 and 21, *infra*), we will grant NAAG's motion and accept its unauthorized pleading.

[5] The Chief, Common Carrier Bureau granted one petition. *See* Petition for Waiver filed by FaxChek Systems, 7 FCC Rcd 3331 (Com. Car. Bur. 1992) (*FaxChek Systems*). AT&T and MCI petitioned for waivers of the preamble requirement for specific programs billed on a per-minute basis. The Bureau issued interim letter waivers pending Commission action on the requests. However, on January 14 and February 12, 1993, respectively, MCI and AT&T filed motions to withdraw their petitions because the IPs were not providing the subject programs. We grant these motions.

[6] NAIS states that it filed its petition one day late because its courier seeking to deliver the petition to the Commission arrived after the deadline for filing documents with the Office of the Secretary. NAIS also filed, on December 3, 1991, a "Motion to Hold Rules in Abeyance Pending Petition for Reconsideration." We dismiss that motion as moot, because the rules went into effect on December 2.

[7] 463 F.2d 268 (D.C. Cir. 1971).

[8] 809 F.2d 863 (D.C. Cir. 1987).

[9] *See* Virgin Islands Telephone Corp., Order, 7 FCC Rcd 4238 (1992) and cases cited therein.

[10] Pub. L. No. 102-556.

[11] Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 93-87 (adopted February 11, 1993 (*TDDRA NPRM*).

[12] AT&T Petition at 2, n.**, AT&T Reply at 2, n.*, COAC Petition at 7.

[13] COAC Petition at 4.

[14] *Id.* at 8.

[15] IIA Opposition at 7.

threshold. Industry members are apparently able in some circumstances to take actions that ensure that usage sensitive programs will not assess charges exceeding the $2.00 per-call cap. However, there is no basis for assuming that all low cost usage sensitive programs will result only in minimal charges to the user; in fact, lengthy usage sensitive programs may generate bills to consumers that far exceed what they expected to pay to hear the entire program. We also conclude that the average charge standard advocated by COAC and NAIS would be difficult to enforce, would require detailed audits, and would be based on past experience, not current activity. Under this standard, fraudulent programs could be detected and sanctioned only after consumers had been defrauded. Given the ease with which IPs can change program content and duration, and the well documented history of abuses in this industry,[16] we find that the criteria suggested by petitioners would potentially create new opportunities for the deception of consumers. Therefore, we decline to modify the rules to exempt usage sensitive programs from the preamble requirement. We note, in any event, that Title II of the TDDRA imposes primary responsibility on the FTC for defining the nominal charge exemption from the preamble requirement. That agency accordingly will be the one to determine whether current or proposed industry practices in this area can adequately protect consumers' interests in this regard.

8. As COAC acknowledges in its petition, the determination of the proper threshold amount for exemption from the preamble requirement is "a matter of regulatory judgment."[17] We reached a balancing of interests, based on the record, in setting the threshold for exemption from the preamble requirement at $2.00 per call.[18] There is nothing in any of the petitions for reconsideration that persuades us that our concerns about injury to consumers were unjustified or that a different balancing of interests would now better serve consumers. Therefore, the threshold amount will remain at $2.00 per call.[19]

2. Exemption of Non-Verbal Programs

9. **Statement of the Issue:** Section 64.711(a) of the rules provides that preambles must be audible, and does not exempt non-verbal pay-per-call programs from the preamble requirements. An example of a non-verbal program would be an IP's computer program accessed via a 900 number from a subscriber's computer and downloaded onto the subscriber's computer on a per-call charge basis. Parties suggest either that the rule should not require "audible" preambles on such programs or that non-verbal programs should be exempt from the preamble requirements.

10. **Positions of the Parties:** IIA's Comments on FaxChek's Request for Waiver[20] states that the requirement of an "audible" preamble is inhibiting the development of pay-per-call services in which a computer would access a database via a modem and be billed through a 900 number. FaxChek's Request for Waiver describes the possible ways in which a preamble could be provided on facsimile pay-per-call programming and explains why they are not technically feasible. NAIS comments that we should exempt some or all non-verbal programming from the preamble requirement. It also advocates that the applicability of preambles should turn on how contact is made with the program by consumers. It describes technologies under development that would use facsimile delivery but would not be suitable for a verbal preamble. MCI and IIA both support an exemption of some non-verbal programs from the preamble requirement.[21]

11. **Decision:** In the *Report and Order*, we did not exempt non-verbal programming from the preamble requirement because the record did not support a finding that the technical difficulties of providing a preamble were so great as to warrant an overall exception.[22] We realize, however, that there are legitimate services that may not be able to place a verbal preamble on the program because no reasonable method exists.[23] We can accommodate petitioners' concern that our current rule inhibits the development of non-verbal programs and our concern that consumers obtain the preamble information for these services by changing the rule to provide that the preamble for such programs need not be audible.[24] We modify Section 64.711(a) accordingly.

3. Commencement and Accuracy of Charges

12. **Statement of the Issue:** Section 64.711(c) requires that "billing will commence only ... following the disclosure message ..." and the *Report and Order* states that carriers will not be allowed to bill consumers for the preamble portion of the call.[25] Parties seek reconsideration of this requirement and question who bears responsibility for accuracy of billing.

13. **Positions of the Parties:** NAIS advocates changing the rules to allow IPs to charge preamble time to callers who continue to listen to a program after the end of the preamble. It argues that, once the preamble is in place, its intended purpose is in no way advanced by whether or not the caller who wishes to access the service has to pay for the preamble time. NAIS disagrees with our statement that not allowing a charge for the preamble is "consistent with consumer expectations and essential to prevent abusive use of the preamble requirement."[26] NAIS argues that consumers do not expect to receive the preamble time for free and that, until our rules became effective, it was common industry practice for programs with preambles to charge callers who continued the call for preamble time. NAIS and COAC also argue that the preamble bypass permitted by the rules, in conjunction with the subject billing requirements, will allow consumers to manipulate the system

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[16] *See Report and Order*, 6 FCC Rcd at 6166, n.2; Comments of Attorney General Humphrey at 13-23.

[17] COAC Petition at 3.

[18] *See Report and Order*, 6 FCC Rcd at 6169-70.

[19] We decline to index the threshold amount to inflation because the administrative complexity of such a mechanism would outweigh any benefits.

[20] Both FaxChek's Request for Waiver and other parties' comments on it were filed in CC Docket 91-65.

[21] MCI Opposition at 3; IIA Opposition at n.22.

[22] *Report and Order*, 6 FCC Rcd at 6170.

[23] *See Faxchex Systems*, n.5, *supra*.

[24] It is, of course, the FTC that will have to decide on the type of preamble for non-verbal programs under the TDDRA.

[25] *Report and Order*, 6 FCC Rcd at 6171.

[26] NAIS Petition at 9, citing *Report and Order*, 6 FCC Rcd at 6171.

and obtain program information without charge.[27] NAIS states that this problem could be cured by allowing IPs to charge end users for preamble time if they do not hang up before the end of the preamble.

14. Pacific argues that LECs should not be held responsible for the accuracy of the billing for preambles, which is done by the IXCs.[28] Pacific states that only the IXCs will know whether calls have been rated in accordance with the rule. Pacific argues that responsibility for compliance ought to be placed on the IXCs who have the ability to correct the problem by fixing the rating problem or denying service to an offending IP.[29]

15. **Decision:** We will not modify our requirement that charges to consumers begin only after the preamble. We are not persuaded by NAIS's assertion that consumers expect to pay for the preamble time. In fact, allowing billing for preambles would permit IPs to prolong the preamble simply to increase their charges. There is no evidence in the record that voluntary preambles were widely used or that such use endured long enough for consumers to form any expectations about preamble charges. Also, NAIS's arguments focus on the impact of our preamble requirement on low-cost, short duration calls, which may not even be subject to the preamble requirement, and fail to address the impact that its proposal would have on consumers who call the more expensive pay-per-call programs.

16. We recognize that consumers could possibly abuse the bypass provision to obtain program information without paying for it if charges are not imposed for the preamble time. However, our rule does not require IPs to provide bypass capability, but rather merely allows them to offer it as an option. Also, nothing in our rules prevents IPs from structuring their programs to minimize the potential for such abuse. Further, the IXCs or LECs may develop the ability to detect a caller's exercise of the bypass mechanism; nothing in our rules prevents the carriers from beginning billing as soon as the caller has bypassed the preamble. We are not persuaded that this potential problem justifies modifying our requirement prohibiting charges for preambles.

17. We agree that the responsibility for ensuring that billing begins at the correct time should rest on the carrier responsible for rating the calls, since it has the most control of that process. Therefore, the carrier responsible for rating the call is responsible for ensuring that billing for pay-per-call services does not commence until permitted by the rules.[30]

4. Scope of Children's Preamble Warning

18. **Statement of the Issue:** Section 64.711(d) requires that all programs "aimed at or likely to be of interest to children under the age of eighteen" contain a special parental permission warning. Parties advocate that we lower the age limit and narrow the scope of the standard for determining when the preamble must contain the parental permission warning.

19. **Positions of the Parties:** AT&T recommends that the age limit be reduced to twelve years old. It argues that the FTC, the Children's Advertising Review Unit of the Better Business Bureau and this Commission (in a rule making on advertising in children's television programming)[31] all adopted a standard of twelve years or younger for determining when extra protection for children is warranted. AT&T contends that children over the age of twelve will have the ability to understand that calling a pay-per-call line will result in charges to their telephone bill, thereby making the warning unnecessary for teenagers. AT&T contends that our *Report and Order* failed to provide any reasoned explanation for imposing the children's preamble requirement on programs aimed at this latter age group. MCI does not support AT&T's request that we define children as those twelve and under, arguing that "generally an individual is not considered an adult until the age of eighteen."[32] NAAG supports the age limit in the current rule.[33]

20. AT&T also objects to the "likely to be of interest to" language. It states that the standard is too broad and would require carriers to put the children's warning on virtually any pay-per-call program. AT&T recommends that the rule be revised to require the children's warning on programs "aimed at or marketed to" children.[34] AT&T also argues that the ambiguous scope of this regulation may raise serious due process concerns. NAIS also objects to the "likely to be of interest to" language. It suggests a more moderate rule targeted at programs with content which appeals to children, such as games and adult programming. Alternatively, NAIS cites with approval the definition of "children's programming" in AT&T's Premium Billing standards which includes programs "whose message content or promotion is directed at, or may reasonably be foreseen to be attractive to children...." NAIS states that the current rule "reflects an over-inclusive regulatory approach."[35] MCI supports the "aimed at or marketed to" standard proposed by AT&T.[36] NAAG supports the current standard.[37]

21. **Decision:** We will not change the rule. Contrary to petitioners' argument, we have not selected a single age standard to separate children from adults for all regulatory

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[27] COAC Petition at 6-7. NAIS Petition at 9. Both parties argue that a caller could initiate the bypass feature, listen to whatever program material was contained in the time allowed for the preamble, and hang up without incurring charges. *See also* letter from M. Blake Barker, Gannett Corp. to Donna Searcy (March 3, 1992) (*ex parte* presentation expressing concern about callers bypassing the preamble and obtaining free service).

[28] Pacific Petition at 1-4.

[29] *Id.* at 2. *See also* Ameritech Opposition at 2 (supports Pacific's request on this issue; if LECs are liable, they would either have to abandon billing for pay-per-call or become "intrusively involved" in the activities of their IXC customers).

[30] USTA asks us to clarify that our rule does not prevent LECs from billing IXCs for access charges incurred before the preamble ends. *See* USTA Petition at 1. We so clarify. Additionally, this rule does not prohibit IXCs from charging IPs for the time involved in delivering the preamble. The rule deals solely with the charges assessed on the calling party.

[31] *See* AT&T Petition at 5, n. *, citing Policy and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (1991) (*Children's Television*).

[32] MCI Opposition at n.2.

[33] NAAG Opposition at 4. (NAAG states that this pleading was filed to refute the AT&T Reply's characterization of its position on these issues. *See* NAAG Motion to Accept Responsive Pleading at 3.)

[34] AT&T Petition at 7.

[35] NAIS Petition at 11-12.

[36] MCI Opposition at 4.

[37] NAAG Opposition at 4.

purposes. The age range of children for which the government should provide special protection varies according to the nature of the problem. Thus, in another proceeding, we defined "children's programming" as "programs originally produced and broadcast primarily for an audience of children 12 years old and under."[38] However, we stated in that decision that the age standard was selected to effectuate the intent of Congress and to protect against overcommercialization in children's programming. In the same proceeding, we defined "children" as "16 years of age and under" when considering how to evaluate a broadcast licensee's record of providing children's programming.[39] The rational basis for applying a different age limit in this proceeding is that a child's ability to turn an impulse to buy immediately into an actual purchase of a service that is by nature non-returnable is much greater with pay-per-call services than broadcast advertising and, therefore, a higher age standard is rational. When we balance the need to protect children who lack the maturity to make an informed purchase decision against the adverse impact that imposing the children's warning would have on pay-per-call programs which have only a tangential appeal to children, we determine that the rule should be retained as originally adopted.[40]

5. Preamble in a Foreign Language

22. **Statement of the Issue:** The rules do not address foreign language programs and preambles and the possible abuses in this area.

23. **Positions of the Parties:** California State Assemblywoman Jackie Speier suggests that the Commission require that, if the advertising for a pay-per-call service is in a foreign language, then the preamble and program must be in that same language.[41] The petitioner states that the State Committee on Consumer Protection, Governmental Efficiency and Economic Development had received testimony from the California State Department of Justice that there had been an increase in foreign language advertisements which encourage persons to call a 900 number. However, the petition states that the preamble and program content of some of those programs is in English, a language which many of the callers do not understand. No party commented on this suggestion.

24. **Decision:** This issue was not raised in the comments in this proceeding, although we agree that there may exist some potential for abuse in this area. However, we lack the jurisdiction to impose restrictions on the advertising for pay-per-call programs; as we have noted, under the TDDRA it is the FTC that will have responsibility for adopting the rules governing both the advertising and the content of preambles for pay-per-call programs. Accordingly, we decline to amend our rule in this regard.

B. Preemption of State Preamble Requirements

25. **Statement of the Issue:** In the *Report and Order*, the Commission preempted state preamble requirements on jurisdictionally mixed 900 services. We noted that 900 calls use the same facilities and a single nationwide number, and that neither the IPs, LECs nor IXCs will know whether a 900 call is intrastate.

26. **Positions of the Parties:** The CPUC and the NYDPS each argue[42] that our preemption of state preamble requirements is unlawful under the Administrative Procedure Act,[43] because we allegedly did not give adequate notice of our intent to preempt in the Notice of Proposed Rule Making.[44] CPUC and NYDPS also argue that the record does not support our finding that intrastate calls to jurisdictionally mixed 900 services cannot be sorted and routed to separate state and federal preambles. Finally, both petitioners argue that the Commission failed to show a sufficient federal interest to justify preemption of state authority.

27. IIA urges the Commission to reject NYDPS' argument on the ground that the proliferation of state proposals for 900 regulation threatens the viability of the nationwide information delivery system and because of the practical impossibility of jurisdictionally sorting calls to a 900 number.[45] Also, MCI opposes the petitions filed by CPUC and NYDPS on the ground that it would be "burdensome" to have separate preambles for the intrastate and interstate traffic to a single 900 number.[46]

28. AT&T did not oppose the Commission's limited preemption. However, it informed the Commission after the close of the pleading cycle herein that its Advanced Multiquest Feature currently enables information providers to separate the interstate from the intrastate traffic to a specific 900 number.[47] It also stated that most information providers would have to purchase AT&T's Advanced Multiquest Features, additional access capacity and/or capabilities and different or additional CPE in order to apply the appropriate state or federal preamble to each call to a 900 program.[48]

29. **Decision:** In interpreting Section 2(b)(2) of the Communications Act[49] the courts have held that the Commission may preempt state regulation of intrastate communications where interstate and intrastate aspects of a jurisdictionally mixed service are inseverable and state reg-

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[38] *Children's Television*, 6 FCC Rcd at 2112.

[39] *Id.* at 2114.

[40] We note that the TDDRA prohibits pay-per-call services directed at "children under the age of 12" (except for educational programs), and requires notification in *all* messages that parental consent is required for calls made by children. *See* Section 201(a)(2)(A)(iv). The FTC rules governing advertising of pay-per-call services will require a parental permission notification in advertising directed primarily to individuals' under the age of 18. Section 201(A)(1)(E).

[41] Assemblywoman Speier Petition at 1.

[42] CPUC Petition at 3-4; NYDPS Petition at 2-4.

[43] 5 U.S.C. Section 553.

[44] Policies and Rules Concerning Interstate 900 Telecommunications Services CC Docket No. 91-65, Notice of Proposed Rule Making, 6 FCC Rcd 1857 (1991) (*NPRM*). Notice and comment rulemaking is not required for preemption. *See* New York State Comm'n on Cable Television v. FCC, 669 F.2d 58, 62 n.9 (2d. Cir. 1982); Brookhaven Cable TV, Inc. v. FCC, 573 F.2d 765, 768 (2d. Cir. 1978), *cert. denied*, 441 U.S. 904 (1979). In any event, we find that because the Commission's preemption was the "logical outgrowth" of the proceeding started in the *NPRM*, it meets the standard in Public Service Commission of the District of Columbia v. FCC, 906 F.2d 713 (D.C. Cir. 1990).

[45] IIA Opposition at 9.

[46] MCI Opposition at 2.

[47] *See* letter from D. V. Golden, District Manager, Government Affairs for AT&T, to Donna Searcy, Secretary, Federal Communications Commission (June 17, 1992) (*ex parte* letter filed in CC Docket 91-65).

[48] *Id.* at 1. *See also* AT&T FCC Tariff No. 1, Section 5.4.4.B.

[49] 47 U.S.C. § 152(b)(2).

ulation would thwart or impede federal policies.[50] In the *Report and Order*, the Commission had before it a record establishing that neither the LECs, the IXCs nor the IPs had the capability to jurisdictionally sort the traffic to a 900 service to separate the intrastate calls.[51] Because permitting state regulation of jurisdictionally mixed 900 service would thwart or impede the federal policy of facilitating development of interstate 900 services, preemption at that time was justified. However, it appears in view of AT&T's new tariff offering that isolation of intrastate 900 calls on a real-time basis is now or soon will be technically possible. Therefore, IPs may be able to apply state-imposed preamble requirements to intrastate 900 calls, and one of the fundamental bases for preemption, jurisdictional inseverability, may no longer be valid. The record does not contain adequate information on the IXCs' current ability to jurisdictionally sort calls or on the availability or cost of those features. We conclude, however, that seeking additional comment to resolve the severability issue in the subject proceeding would serve no valid purpose because the Commission's limited preemption will cease upon the effectiveness of the FTC rule. Consequently, we will not request further comments on whether the Commission should continue to preempt inconsistent or supplemental state-imposed preambles on incidental intrastate traffic to a 900 service in light of AT&T's new service offering. We preempted state requirements only with respect to state-mandated preambles that differed from our rule. This limited preemption was necessary to facilitate the development of interstate 900 services. We have proposed in the *TDDRA NPRM* to abolish our preamble requirement in view of the statutory mandate that the FTC adopt preamble requirements and impose those requirements directly on the IPs.

C. Identification of Information Providers on Bill

30. **Statement of the Issue:** Section 64.712 of the Commission's rules requires that IXCs must provide the name, address and customer service telephone number of IPs upon written or oral request; such information need not be printed on the telephone bill.

31. **Positions of the Parties:** NYCDT reiterates its request that we require that carriers print the information provider's name, address and telephone number on all bills containing charges for 900 services. In the alternative, NYCDT asks us to require that the IP's name be on the bill, with a notice that the consumer may obtain the IP's address and telephone number from the IXC.[52] MCI opposes that request on the grounds that the information is already obtainable under the Commission's rules and that making the changes requested by NYCDT would be costly.[53] Ameritech opposes the request on the ground that it would make the LEC bill "extremely lengthy and detailed in a manner that will not necessarily be helpful to end users." Ameritech states that, as bills become more voluminous, customers become more confused.[54]

32. **Decision:** The record herein indicates that the practical difficulties involved in implementing NYCDT's proposal may outweigh the modest incremental benefit which NYCDT's proposal would provide to consumers. The opposing parties cite substantial reasons why NYCDT's proposal is not worth the economic burdens and operational difficulties that it would impose on the LECs.[55] We note that our current rule provides reliable information to consumers at a much lower cost to the industry. However, the TDDRA mandates that LECs provide billing information that currently is not required by our rules, although not to the extent proposed by NYCDT. Also, carriers will be required to educate consumers about their right to obtain information about IPs. Therefore, rather than attempt to fashion a rule in this proceeding concerning what billing information should be required, we defer action on this issue to our proceeding implementing the TDDRA in which we are inviting comments on what additional information, if any, should appear on the bills.

D. Recovery of Costs in Blocking

33. **Statement of the Issue:** Section 64.713 of the Commission's Rules requires that blocking of 900 service be available to all subscribers but does not require that it be free to commercial subscribers. NYCDT advocates that blocking for commercial subscribers should be provided at no cost.

34. **Positions of the Parties:** NYCDT argues that, since most pay-per-call services are not tariffed, a subscriber's responsibility to pay for them is governed by contract, not tariff, principles. Since the traditional tariff principle that a subscriber is responsible for all calls made from its telephone would not apply under this interpretation, NYCDT

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[50] Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986); Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); NARUC v. FCC, 880 F.2d 422 (D.C. Cir. 1989). *See also* North Carolina Utils. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) and North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[51] *Report and Order*, 6 FCC Rcd at 6180. Comments of Telesphere at 21 (Although they can be separated after the fact for billing purposes, the call processing equipment employed by most IPs and service bureaus today cannot identify intrastate calls on a real time basis and process them in a manner different from interstate calls). *See also* ACI's Comments at 19-20 (It would be extremely difficult, both practically and technically, to separate interstate and intrastate 900 calls). We recently determined that the LEC originating a 900 services call is unable to determine whether the call is interstate or intrastate, and thus it is unable to identify and block 900 calls on a jurisdictional basis. Petition for an Expedited Declaratory Ruling Filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc., FCC 93-45 (released January 22, 1993).

[52] NYCDT Petition at 9.

[53] MCI Opposition at 2. *See also* SWBT Reply at 3 (Commission's rules already allow consumers to obtain this information).

[54] Ameritech Opposition at 2.

[55] Ameritech Reply at 3-4 (LEC bills are too long, complicated and confusing as it is. Additional detailed bill disclosure requirements are likely to contribute to any preexisting customer dissatisfaction with the LEC bill); BellSouth Reply at 3 (The number of information providers and the frequency of name/location/telephone number changes would preclude maintenance of a current database). This proposal was also criticized during the earlier phase of this proceeding. *See* Reply Comments of United at 2 (United's billing system could not, without substantial time and money being spent on modification and expansion, provide information on each bill on how a consumer can contest a 900 charge and the name and address of the IP.)

argues that the IXCs and information providers will be ultimately responsible for the cost of these calls. Therefore, NYCDT argues that IXCs and information providers, not subscribers, will bear the losses from unauthorized pay-per-call calls and that free blocking for commercial subscribers will benefit the IXCs and information providers by reducing their losses.[56] USTA and SWBT oppose this request.[57] SWBT argues that the Commission's current rule allowing charges to commercial subscribers "is in the public interest and puts the cost of blocking on the cost causer."[58] USTA objects to our determination that the costs of blocking are "not exogenous."[59]

35. **Decision:** The *Report and Order* considered the issue of blocking in an environment in which a majority of states had already mandated 900 blocking requirements or accepted tariffs providing for it and those states had cost recovery mechanisms in place. The *Report and Order* stated that we would "not alter the manner in which the LECs recover the costs incurred in blocking 900 calls at this time."[60] Further, we noted that the one-time free blocking requirement for residential subscribers was a limited exception to our policy that the subscriber who causes a cost should bear the responsibility for payment thereof.[61] Granting the NYCDT request would have the effect of expanding this exception. Many of the state commissions that have considered this issue, including the NYDPS, have determined that a charge on commercial subscribers wishing to block 900 services is reasonable.[62] In any event, the new blocking requirements mandated by the TDDRA allow all subscribers, including commercial subscribers, to obtain free blocking of 900 services during the mandated 60-day period. This new provision partially grants NYCDT the relief it requests.

36. We disagree with USTA's argument that blocking costs are exogenous under the price cap rules. Not all costs resulting from governmental action are automatically treated as exogenous costs.[63] Only those costs listed in Section 61.45(d), as discussed in the *LEC Price Cap Order*, qualify as exogenous. Absent any sua sponte waiver grant on our part, and as discussed below, USTA has given us no reason to grant such a waiver on the present record. USTA would have to file a separate petition for rulemaking or petition for waiver to permit a deviation in application of Commission rules. Moreover, we only require blocking where "technically feasible," and thus our action does not require the LECs to replace central office equipment to comply with the rule. Blocking is an activity which has evolved over the years, apparently both on a voluntary basis by carriers and pursuant to state requirements. Finally, there is no showing in this record that the costs of complying with our requirement are significant.

E. Bundling of Blocking for 900 and Other Exchanges

37. **Statement of the Issue:** Section 64.713 of the Commission's rules requires that LECs must make blocking for 900 services available, where technically feasible. However, the rule is silent concerning whether, and under what circumstances, LECs may bundle 900 blocking with blocking for other exchanges.

38. **Positions of the Parties:** AT&T requests that we consider whether LECs must unbundle their offering of blocking for 900 services.[64] AT&T states that some LECs bundle the blocking of 700 and 900 services.[65] AT&T offers a variety of business services over the 700 exchange and claims that this type of bundled blocking will force businesses to block their access to many of AT&T's business services. MCI supports AT&T's position with regard to common blocking of the 700 and 900 exchanges.[66] US West and SWBT oppose this request, arguing that using a "common block" for 900 and other prefixes is more cost effective. They state that requiring separate blocking would demand extensive switching capacity because the number of line class codes needed to provide blocking increases exponentially as the number of exchanges to be blocked increases.[67] However, US West states that it does not use a common block for the 700 and 900 exchanges, but does employ common blocking on the 900 exchanges and exchanges, such as 976, used primarily to provide intrastate information services.[68]

39. **Decision:** The IXCs and LECs both raise legitimate concerns. The IXCs are concerned that common blocking of the 700 and 900 exchanges by the LECs would force business customers to choose between avoiding liability for pay-per-call charges and accessing the business services which the IXCs provide over the 700 exchange. On the other hand, the LECs understandably wish to fulfill their blocking obligations in an economical manner by combining blocking for pay-per-call services. We believe that the IXC's concerns in this regard are paramount, and therefore clarify that 900 service blocking we have required may not be bundled with blocking for the 700 exchange. We note that we are proposing in the *TDDRA NPRM* to exclude pay-per-call services from the 700 exchange. Other issues concerning bundling of blocking features may be addressed in that proceeding.[69]

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[56] NYCDT Petition at 3-7.

[57] USTA Opposition at 2; SWBT Reply at 3.

[58] SWBT Reply at 3.

[59] USTA Petition at 2. USTA also argues that we should order that small LECs that modify their billing systems to implement the disconnection requirements should be able to recover their costs from ratepayers. *Id.* at 3. We declined, in the *Report and Order*, to disturb the existing cost recovery mechanisms and USTA has presented no arguments supporting a different decision.

[60] *Report and Order*, 6 FCC Rcd at 6176.

[61] *Id.* at 6175, n.84.

[62] Comments of NYCDT in response to the *NPRM* at n.7.

[63] Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6808 (1990) (*LEC Price Cap Order*) (equal access costs and costs imposed by changes in depreciation rates are treated as endogenous, not exogenous, even though they result from governmental requirements).

[64] AT&T Petition at 7-9.

[65] AT&T states that the following LECs currently bundle blocking for the 900 and 700 exchanges: Cincinnati Bell, GTE South (West Virginia), New York Telephone, Ohio Bell and Southwestern Bell (Missouri). AT&T Reply at 4, n. **.

[66] MCI Opposition at 2-3.

[67] US West Opposition at 3, n.8, and SWBT Reply at 1-2.

[68] US West Opposition at 1, n.3 and 2, n.7. *See also* SWBT Reply at 2.

[69] On a related issue, US West requests us to clarify that our pay-per-call rules do not apply to 976 services in local calling areas that cross state lines. *See* US West Petition at 1. US West would limit this to 976 services which are not accessed through an IXC. Provided that the 976 services are subject to state

IV. CONCLUSION

40. In this Order, we retain our preamble requirement for pay-per-call programs, but revise Section 64.711(a) of the Commission's Rules to clarify that there need not be a preamble for non-verbal programs. Without changing any additional rules, we clarify the responsibilities of IXCs and LECs for accurately billing preambles and state that our limitation on the commencement of charges applies only to charges to end users, not to access or telecommunications charges. We also determine that LECs may not bundle blocking of 700 and 900 services, and we clarify that our rules do not apply to local pay-per-call exchanges, such as 976, which serve a local calling area which crosses state lines but is subject to state regulation.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205 and 405, that the petitions for reconsideration filed in this proceeding ARE DENIED, except as provided herein.

42. IT IS FURTHER ORDERED, that Part 64 of the Commission's rules, 47 C.F.R. Part 64, IS AMENDED as set forth in Appendix B, effective 30 days from publication of the text thereof in the *Federal Register*.

43. IT IS FURTHER ORDERED, that COAC's request that the Commission stay the effectiveness of the pay-per-call rules and NAIS's Motion to Accept Late Filed Petition for Reconsideration and Motion to Hold Rules in Abeyance ARE DISMISSED.

44. IT IS FURTHER ORDERED, that NAAG's Motion to Accept Responsive Pleading IS GRANTED.

45. IT IS FURTHER ORDERED, that the motions to withdraw petitions for waiver filed by MCI and AT&T ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS RECONSIDERATION PROCEEDING

Petitions for Reconsideration and/or Clarification

American Telephone and Telegraph Company	AT&T.
California Public Utilities Commission	CPUC
Council on Audio Communications	COAC
National Association of Regulatory Utility Commissioners	NARUC
City of New York Department of Telecommunications and Energy	NYCDT
State of New York Department of Public Service	NYDPS
Pacific Bell	Pacific
Assemblywoman K. Jacqueline Speier	Assemblywoman Speier
US WEST Communications, Inc.	US West
United States Telephone Association	USTA

Comments/Oppositions

Ameritech Operating Companies	Ameritech
Information Industry Association	IIA
MCI Telecommunications Corporation	MCI
National Association for Information Services	NAIS
US WEST	
USTA	

Replies

AT&T	
Southwestern Bell Telephone Company	SWB

Further Reply

National Association of Attorneys General, 900 Number Subcommittee	NAAG

APPENDIX B

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, unless otherwise noted.

2. Section 64.711 is amended by modifying paragraph (a) to read as follows:

§64.711 Preamble.

(a) Programs must begin with a clearly understandable and (except for non-verbal programs) audible preamble that states the cost of the call. The preamble must disclose all per call charges. If the call is billed on a usage sensitive basis, the preamble must

regulation, we do not see any need to apply our rules to such services. If an information provider began marketing such lines on an interstate basis, using interexchange carriers or foreign exchange lines, however, our rules would apply to its information services.

state all rates, by minute or other unit of time, any minimum charges and the total cost for calls to that program if the duration of the program can be determined. No preamble is required for programs with a flat-rate charge of $2.00 or less.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-40

In the Matter of

Allocation of the 219-220 MHz Band for Use by the Amateur Radio Service — RM-7747

NOTICE OF PROPOSED RULE MAKING

Adopted: February 26, 1993; Released: March 22, 1993

Comment Date: June 15, 1993
Reply Comment Date: July 15, 1993

By the Commission:

I. INTRODUCTION

1. By this action, the Commission proposes to allocate the 219-220 MHz band to the amateur service on a secondary basis for amateur auxiliary station (point-to-point) packet backbone networks and other amateur point-to-point fixed communications.[1] The proposed allocation would alleviate frequency congestion that amateurs are experiencing in certain areas of the country in the 222-225 MHz band and would facilitate establishment of regional and nationwide backbone networks for amateur packet communications. We also propose requirements to ensure that secondary use of the 219-220 MHz band by amateurs does not interfere with primary and existing secondary licensees in this and adjacent bands. These proposals are in response to a petition for rule making (RM-7747) filed by the American Radio Relay League (ARRL).

II. BACKGROUND

2. The 216-218 and 219-220 MHz bands currently are allocated on a primary basis to the maritime mobile service for Automated Maritime Telecommunications Systems (AMTS).[2] The 218-219 MHz band is allocated on a primary basis to Interactive Video and Data Services (IVDS).[3] In addition, frequencies within the 216-220 MHz band are allocated on a secondary basis to wildlife telemetry,[4] radiolocation,[5] fixed and land mobile services, and aeronautical mobile service.[6] Television broadcast channel 13 operations occupy the adjacent 210-216 MHz band.

3. Packet radio systems transmit digital data in groups or "packets" using a specified format. Radio channels used by these systems are occupied only during the time individual "packets" of data are actually being transmitted. Upon completion of a transmission the channel becomes available for other traffic. Amateurs use packet radio for transmitting a variety of material, including messages, computer programs, graphic images and data bases. These systems can be used in times of emergency to efficiently carry a large volume of messages when other communications facilities are out-of-service or overloaded. Amateur radio operators use special wideband packet radio networks to provide intercity links for their packet radio systems. Amateurs are permitted to send data, radio teletype (RTTY), and analog signals, including all types of packet communications in the 222-225 MHz band. The packet auxiliary networks are point-to-point fixed systems and are permitted in the 222-225 MHz band and on higher frequency bands.

4. In its petition, ARRL requests that the Commission authorize access to 216-220 MHz by amateur wideband packet networks and other point-to-point fixed communications services on a secondary basis.[7] ARRL states that this spectrum is needed because the 222-225 MHz band is very congested in many areas and because amateurs were planning to use the 220-222 MHz band for a new regional and/or nationwide backbone packet network system before the band was reallocated. ARRL points out that the planned network also could be used for emergency preparedness and national defense communications.

5. In making this request, ARRL submits that spectrum in the 220 MHz range is uniquely suited for the relatively long packet links needed to efficiently construct a regional or nationwide backbone system, and that no reasonable spectrum alternatives exist for this type of network. It states that interference by amateurs to the primary services using this and the adjacent bands can be prevented through power limitations and careful attention to geographic and frequency separation. ARRL also suggests that some form of coordination be required. In support of its petition, ARRL submits a study performed by its laboratory[8] and

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[1] This proposed allocation is intended for point-to-point intercity links to connect local packet hubs in regional and nationwide networks. It is not intended to be used for local packet networks (which operate on a point-to-multipoint basis) or for mobile uses.

[2] *See* 47 C.F.R. §§ 2.106, 80.475.

[3] *See* 47 C.F.R. §§ 2.106, 95.801 *et seq.*

[4] This secondary allocation authorizes tracking of, and telemetering of scientific data from, ocean buoys and wildlife.

[5] Radiolocation was reduced to secondary status as of January 1, 1990, *see* note 627 to the Table of Frequency Allocations, 47 C.F.R. § 2.106. Additionally, note US229 states that stations in the fixed and mobile services are prohibited from causing interference to the U.S. Navy's SPASUR system.

[6] Land mobiles and aeronautical mobiles are limited to telemetering and associated telecommand operations in this band.

[7] ARRL filed this petition after the Commission denied its petition for reconsideration of the reallocation of the 220-222 MHz band from the amateur service to government and non-government land mobile services. In its denial, the Commission dismissed ARRL's suggestion made for the first time in its comments on its petition for reconsideration that an allocation for amateurs be considered in the 216-220 MHz range, but stated that ARRL could submit a petition making a specific proposal. *See Report and Order*, GEN Docket 87-14, 3 FCC Rcd 5287 (1988), *recon.*, 4 FCC Rcd 6407 at note 23 (1989).

[8] *See* "Interference to Television Channels 11 and 13 From Transmitters Operating From 216 MHz to 220 MHz, App. A of

another study by Atlantic Research Corporation[9] commissioned by the ARRL. These studies indicate that amateur operations can share the 216-220 MHz band with existing users without causing interference to broadcast television channel 13 (210-216 MHz), particularly at frequencies above 218 MHz.

6. On July 23, 1991, the Commission placed ARRL's petition on public notice and invited comment. Of twelve commenting parties, only the Association for Maximum Service Television, Inc. (MSTV) opposes ARRL's petition.[10]

III. DISCUSSION

7. Historically, the amateur service has contributed to the development of radio technology and at the same time fulfilled communications requirements during times of emergency. To assist and encourage amateur radio operators in these continuing efforts, we are proposing to allocate on a secondary basis, the 219-220 MHz band for amateur intercity wideband packet radio networks and other point-to-point fixed operations, subject to conditions intended to protect other services. We believe that allocating this additional spectrum for amateur wideband intercity packet networks will serve the public interest by 1) relieving congestion that exists in the 222-225 MHz band in certain geographic areas; 2) encouraging the development and implementation of a regional and/or nationwide packet network that can be used for emergency and national defense communications purposes; 3) facilitating connection of local packet nodes to form such regional and nationwide networks; and 4) providing spectrum for exploration of new technology related to these purposes.

Spectrum Allocation

8. In requesting access to the 216-220 MHz band, ARRL states that the 222-225 MHz band cannot accommodate the existing and planned amateur operations that were displaced from the 220-222 MHz band following reallocation of that band from the amateur service to the land mobile services. It submits that these networks now cannot be completed in some areas of the country due to congestion of network operations in the 222-225 MHz band. ARRL further states that in some locations, packet radio is unable to operate in the 222-225 MHz band because of non-compatibility with relatively high power omni-directional amateur repeater systems that also operate in this band.

9. The parties responding to ARRL's petition generally support the proposal to make the 216-220 MHz band available for amateur use. The Valley Emergency Radio Association (VERA) submits that amateurs need access to this band. VERA claims that, in addition to inhibiting the growth of packet backbone networks, loss of the 220-222 MHz band has forced it to discontinue some of its packet links and that its north-south trunks, which carry packet transmissions throughout California, have been adversely affected by loss of these operations. VERA states that it cannot replace some of its lost packet links because of the many amateur repeaters operating in the 222-225 MHz band in southern California.

10. The Chief Regulatory Counsel of the Defense Information Systems Agency (DISA), on behalf of the National Communications System (NCS),[11] states that allocation of additional spectrum in the 216-220 MHz range would facilitate participation by amateurs in the NCS Emergency Preparedness and National Defense Communications system. The DISA Chief Regulatory Counsel states that ARRL, on behalf of the amateurs, is party to a *Memorandum of Understanding* with the NCS that establishes a broad framework of cooperation involving national emergency communications functions.

11. The New Hampshire Office of Emergency Management (NHOEM) submits that amateur packet communications should be permitted in the 216-220 MHz band and that access to these frequencies is particularly important for emergency communications in rural areas of New Hampshire. NHOEM states that the 216-220 MHz band has propagation characteristics that would enable long distance communications between isolated communities that cannot be accomplished using higher frequency amateur bands. Similarly, VERA claims that it has tried to establish amateur packet radio networks in other amateur bands, but that the propagation limitations of these bands prevent effective operations.

12. In opposing ARRL's petition, MSTV states that no spectrum should be allocated for amateur use in the 216-220 MHz band because of the potential for interference to broadcast television service, primarily to channel 13 operations in the adjacent 210-216 MHz band. MSTV argues that amateur services operate at "high power" and are not geographically limited, and therefore that operation of such services in the 216-220 MHz band could result in significant interference to reception of channel 13 broadcasts. MSTV distinguishes the proposed amateur operations from the services that already operate in the 216-220 MHz band without interfering with television reception. It states that AMTS can operate in this band without interfering because AMTS operations are geographically limited to river and coastal areas. MSTV also indicates that IVDS can operate adjacent to television operations because of its low power and the brief duration of its transmissions. Finally, MSTV asserts that ARRL's technical study of interference potential is technically flawed. Based on these concerns,

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ARRL Petition for Rulemaking, RM-7747." This study was conducted in June of 1990 for the purpose of determining compatibility between typical amateur operations and television broadcast channels 11 and 13. The test was designed using data from a 1975 FCC study of interference to channels 11 and 13 from transmitters in the 216-220 MHz band.

[9] *See* "Compatibility Assessment of the Amateur Service in the 216-220 MHz Band, App. B of ARRL Petition for Rulemaking, RM-7747." This study indicates that amateur services should be able to operate in the 216-220 MHz band without interfering with other services in that band. It further states that amateurs could operate within the Grade A and B contours of television channel 13 stations without causing interference.

[10] Memphis State University's Center For Earthquake Research and Information (CERI) also expresses concern about possible interference from amateur operations in the 216-220 MHz band. CERI is licensed in the business radio service, which is a secondary service, and uses several frequencies in the 216-220 MHz band.

[11] Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions," April 3, 1984 (49 Fed. Reg. 13471), established the NCS. The Executive Office of the President appoints the members of the NCS.

MSTV argues, first, that additional experimentation should be completed before ARRL's petition is considered; second, that even with the interference safeguards proposed by ARRL, a secondary allocation is infeasible; and third, that in any event ARRL's proposal should not be considered until an advanced television (ATV) standard is adopted.

13. *Discussion.* We tentatively conclude that the record demonstrates a specific need for a limited amount of additional spectrum for wideband packet backbone networks. It appears that the 222-225 MHz band is significantly congested in certain areas of the nation and that this congestion is limiting the interconnection of amateur packet networks. We do not, however, find it feasible to allow amateurs use of the entire 216-220 MHz band for these networks and other point-to-point services. As discussed below, we are concerned that amateur use of the 216-219 MHz portion of this band could result in harmful interference to the primary services on those frequencies and to reception of television channel 13 broadcasts. We believe that amateurs could, however, use the 219-220 MHz segment on a secondary basis without causing interference to other services if their operations are properly engineered and appropriate regulatory safeguards are applied. We believe this additional one megahertz, which can provide ten 100 kHz channels, would adequately meet the current and immediate future packet backbone network needs of the amateur service that cannot be accommodated on other amateur spectrum. We also believe that amateurs generally have the expertise to design their packet network systems to operate in the 219-220 MHz band so as to avoid interference to other services and to resolve any interference that may inadvertently occur. Accordingly, we are proposing to allocate the 219-220 MHz segment to the amateur service on a secondary basis. Amateur use of these frequencies would be limited to wideband auxiliary packet networks and other point-to-point fixed services.[12] We seek comment on whether this proposed allocation should be limited to digital data communications, digital communications of whatever nature including digitized voice, or whether any modulation or access method should be permitted so long as it is employed for point-to-point fixed communication.

14. We are aware of MSTV's concern for possible interference to television channel 13 operations by amateur operations in the 216-220 MHz band. We believe our proposal to allow those operations only in the 219-220 MHz segment minimizes the possibility of interference to channel 13 reception. We also note that MSTV does not submit any empirical study or other technical analysis to refute the conclusions of the ARRL and Atlantic Research Corporation studies that amateur packet networks could operate in the 216-220 MHz band without causing interference to channel 13 reception. Moreover, the secondary nature of this proposed allocation will protect channel 13 and all other primary service licensees on frequencies in and adjacent to the 219-220 MHz band. Amateurs will be responsible for resolving any interference their operations may cause to those primary services, including future services such as ATV and new AMTS stations.[13]

15. We note that although the 216-217 MHz segment is allocated to group C and D AMTS coast stations, currently this band is unused.[14] We therefore considered allocating the 216-217 MHz band to the amateur service on a secondary basis. However, as these frequencies are immediately adjacent to television channel 13 and the ARRL study indicates that amateur operations below 218 MHz have significantly greater potential to interfere with channel 13 operations, we believe that these frequencies should not be allocated to the amateurs even for secondary use.

16. The 217-218 MHz segment currently is allocated to AMTS group A and B coast stations. These stations operate at relatively high power (maximum 1000 watts ERP), and therefore it would be difficult for amateur operations to share this band in the vicinity of these stations. Although currently these stations are located only along or near the Mississippi River, Ohio River and the Gulf Coast, recently we amended our rules to permit AMTS stations to be operated anywhere in the United States.[15] We therefore believe that this band should not be allocated to the amateur service.

17. The 218-219 MHz segment was allocated to IVDS effective in March 1992,[16] and we anticipate substantial use of this band throughout the nation. We tentatively conclude that this band should not be allocated to the amateur service at this time because of concerns with interference to a service still to be licensed and implemented.

18. Finally, the 219-220 MHz band currently is allocated to AMTS group A and B ship stations. These stations typically operate at a maximum power of 25 watts, which is 1/40th the power of the group A and B coast stations that operate at 217-218 MHz. We find that this band is the most compatible for sharing with amateur operations. First, amateur operations in this band would pose little risk to television services, as this segment is the furthest from the 210-216 MHz spectrum used by television channel 13. We also believe it is possible for the amateur service to operate in this band without interference to, or from, AMTS ship stations. With careful attention to frequency and distance separation, amateur stations should be able to share the 219-220 MHz band with AMTS ship station operations. We further believe that with careful engineering and planning, secondary amateur operations in the 219-220 MHz band will be possible without causing interference to the land

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[12] We are not proposing to allow weak signal operations and propagation experiments in this band, as proposed by Timothy J. Stoffel and Dwight B. Hill in comments filed in response to RM-7747. Weak signal operations and propagation experiments generally are not point-to-point activities and therefore it would be much more difficult to ensure that such operations would not interfere with primary services in this band. Also, we note that weak signal communications might be accommodated in a subband at 222.00-222.15 MHz that we have proposed be free of repeater operations, *see Notice of Proposed Rule Making*, PR Docket No. 92-289, 7 FCC Rcd 8000 (1992).

[13] The Commission has proposed that all ATV channels be allotted in the UHF broadcasting bands (channels 14-69). This proposal, if adopted, would render moot concerns for interference to ATV broadcasting on VHF channels. *See Second Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 7 FCC Rcd 5376 (1992).

[14] Recently we reallocated the corresponding ship frequencies for the C and D groups, at 218-219 MHz, to IVDS, *supra* note 3, which leaves the group C and D AMTS coast station channels unpaired.

[15] *See First Report and Order*, GEN Docket 88-372, 6 FCC Rcd 437 (1991); *Memorandum Opinion and Order*, 7 FCC Rcd 3607 (1992).

[16] *Supra* note 3.

mobile operations that are expected to begin soon in the adjacent 220-222 MHz segment. In this regard, we note that land mobile radio receivers typically operate with significantly narrower bandwidths and are less susceptible to adjacent channel interference than television receivers. We request specific comment on our conclusion that amateur operations can share these ship station frequencies.

IV. OPERATIONAL ISSUES

19. In proposing to authorize limited amateur services in the 219-220 MHz band, we seek to provide amateurs with operational flexibility that is consistent with our long established policy towards the amateur service. In this regard, we recognize the amateur service's long established purposes of contributing to the advancement of the radio art, and advancing skills in the phases of the art and continue to believe it important to further these purposes wherever possible.[17] Operation of amateur services in the 219-220 MHz band on a secondary basis, however, will necessitate careful attention to the potential for interference to primary services and to other secondary services. The proposals presented below are intended to balance our desire to provide flexibility for amateur operations and the need to ensure that such operations do not cause interference to other services.

20. *Operating Power and Control of Interference.* In its petition, ARRL suggests that amateur packet networks and other point-to-point facilities can operate in the 216-220 MHz band if sufficient distance and frequency separation is maintained to other stations, and that these factors can be controlled by careful engineering. To limit the potential for interference, ARRL also recommends that novice class amateurs be limited to 25 watts peak envelope power (PEP) and that all other classes of amateur licensees be limited to 50 watts PEP output. ARRL claims that a co-channel separation distance of 70 km is needed to protect AMTS receivers in a typical case and 120 km in a worst case scenario. ARRL also recognizes that as a secondary service, amateur operations in this band would be responsible for resolving any and all interference to primary users or to cease operation. Dwight B. Hill, an amateur licensee commenting on ARRL's petition, submits that packet network stations should be required to use beam antennas to limit radiation in undesired directions and should use no more than 250 watts effective isotropic radiated power (EIRP).

21. Waterway Communications Service, Inc. (Watercom) states that ARRL underestimates the potential for interference from amateur packet networks to AMTS operations. It submits that ARRL's estimate of necessary spacing relies on erroneous assumptions regarding AMTS's emissions; bandwidth; receiver sensitivity; antenna gain, type, and height; and categories of service. Watercom states that a greater separation distance is needed than that specified in the petition.

22. Watercom submits that amateur operations should be subject to coordination requirements to guard against interference to primary services and suggests that ARRL would be an appropriate party to serve as the frequency coordinator. In reply comments, ARRL agrees with Watercom that a mandatory frequency coordination plan is desirable and volunteers to serve as the frequency coordinator. Watercom also submits that amateurs within 300 miles of a coastal area or navigable waterway served by AMTS should be required to notify ARRL and the appropriate AMTS licensee(s) if the Commission decides not to adopt a mandatory coordination program. Watercom states that such notification is necessary to inform AMTS licensees of potential interference problems before they occur and to facilitate notification of amateur licensees in the event of actual interference.

23. We believe the power limits suggested by ARRL for the novice and all other classes of amateur operator are appropriate and reasonable. These power levels are sufficient to enable amateurs to accomplish required intercity communications requirements yet are low enough to limit the area in which such operations could cause interference to other services. Accordingly, we are proposing to permit amateur wideband packet network and other point-to-point transmitters to operate with up to 25 watts PEP output for the novice class and 50 watts for all other classes. We also note that Section 97.313(a) of our rules already limits amateurs to the minimum transmitter power necessary to accomplish the desired communications.[18] We believe our proposed power limits and this existing rule together will allow amateurs to operate effective packet networks while protecting other operations in and near the frequencies being used.

24. In considering specific proposals for guarding against interference by amateur services to other users of the 219-220 MHz band, first, we believe that a requirement for mandatory coordination of amateur service licensees by a non-government entity as suggested by Watercom and ARRL generally is not permissible under the Communications Act of 1934, as amended.[19] Therefore, we will not include a mandatory coordination requirement in our plan for regulating interference from amateur operations in the 219-220 MHz band.

25. With regard to protection for AMTS service, the primary user of the 219-220 MHz band, we expect that amateur point-to-point operations will be accomplished with highly directional antennas. The interference potential of an amateur operation to AMTS operations therefore will vary significantly depending on the amateur station's geographic orientation. Such operations could be located relatively near AMTS coast stations without causing interference if the amateur operation does not direct its signal towards the AMTS station. We are proposing an approach that will provide a relatively simple method for identifying and addressing cases where amateur operations could cause interference to AMTS and that also will provide flexibility for both amateurs and AMTS operators to consider the directional nature of the amateur facilities. The approach we are proposing is based on the notification plan suggested by Watercom. Under this approach amateurs would be required to notify the appropriate AMTS licensee of any amateur station that would be within 240 km (150 Miles) of an AMTS station. In addition, we propose to require amateurs to obtain written approval from

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[17] *See* 47 C.F.R. Section 97.1.

[18] *See* 47 C.F.R. § 97.313(a).

[19] *See* Communications Act of 1934, as amended, 47 U.S.C. Section 332. Section 332 explicitly authorizes coordination of private land mobile and fixed services by parties who are not employees of the Federal Government. There is no provision for similar coordination arrangements with regard to the amateur service.

the appropriate AMTS licensee before operating within 80 km (50 miles) of an AMTS station.[20] In either case, amateurs would be required to resolve immediately any complaint of interference to an AMTS station that might arise or, alternatively, to cease operation of the transmitter causing that interference.

26. We believe that most amateur operations located at distances between 80 and 240 km from AMTS operating areas generally would not cause interference to AMTS service. The notification requirement would alert AMTS licensees of the potential source of any interference they might experience. We believe 240 km is an appropriate maximum distance for the notification requirement in view of our proposals for limiting the power levels used by these stations. The 480 km distance recommended by Watercom is unnecessary.[21] At distances closer than 80 km to individual AMTS stations, we believe that, although acceptable amateur operations remain possible, the risk of interference to AMTS increases substantially. We therefore believe it appropriate to provide AMTS licensees the maximum, but still flexible, protection afforded by the option of rejecting an amateur operation closer than this distance. We request comment on this approach for avoiding interference to AMTS operations by amateur operations. Interested parties are specifically asked to comment on the distances that should be specified for invoking the notification and approval requirements.

27. Section 97.201(c) of our rules provides that if an auxiliary station causes harmful interference to another auxiliary station, the licensees are equally and fully responsible for resolving the interference unless one station's operation is recommended by a volunteer frequency coordinator and the other station's operation is not.[22] If one is not coordinated through the voluntary process, the licensee of the non-coordinated auxiliary station has the primary responsibility to resolve the interference.[23] We recommend that the local amateur volunteer coordinator that already addresses operations in the 222-225 MHz band consider also coordinating amateur secondary operations in the 219-220 MHz band. We recognize coordinating these operations would require considering non-amateur primary and secondary users in and adjacent to the 219-220 MHz band, but believe the same coordination principles, based upon radiated power, distance, and type of signal modulation, are applicable. Thus, the resident amateur coordination expertise may be helpful to individual amateurs desiring to commence operations in the 219-220 MHz band. We believe that volunteer coordination would be particularly useful within 240 km (150 miles) of AMTS stations.

28. We note that business radio services, radiolocation operations, and wildlife telemetry operations use the 216-220 MHz band. Amateurs contemplating operations in the 219-220 MHz range would need to consider all such operations when performing interference studies and implementing their systems.

29. *Other Issues.* Amateur wideband intercity packet radio services are classified as auxiliary stations under our rules.[24] Section 97.201(a) of the Rules limits licenses for auxiliary stations to amateurs holding technician, general, advanced and extra class licenses. In view of the interference analysis that would be required of licensees intending to establish service in this band, we request comment on whether the operation of auxiliary stations in the 219-220 MHz band should be restricted to technician, general, advanced and extra class amateurs, or be available to all amateur operators, including novice class amateurs.

30. Finally, amateur service in the proposed 219-220 MHz band would be limited by Section 97.307(f) of the Commission's Rules to a maximum rate of 56 kilobauds and a maximum bandwidth of 100 kilohertz.[25] Initially, we believe that these limits are appropriate for the proposed operations of the amateur service in the 219-220 MHz band. Nevertheless, given the wideband packet use envisioned for the 219-220 MHz band, as technology progresses the rules may become unnecessarily restrictive, particularly with regard to the permissible baud rate. We request that comments specifically address whether each of these limitations should be applied to the 219-220 MHz band, or whether they should be amended for this band.

IV. CONCLUSION

31. We are proposing to authorize amateur wideband packet point-to-point networks and other amateur point-to-point fixed communications on a secondary basis in the 219-220 MHz band. We believe this will foster technological experimentation and innovation, particularly with higher data rates, and facilitate the construction of regional and/or nationwide packet data backbone networks. We expect this action will relieve the congestion that exists in the 222-225 MHz band in certain geographic areas caused by the reallocation of the 220-222 MHz band. The amateurs' ability to perform interference analysis, the generally directional nature of point-to-point communications, and the secondary nature of this proposed allocation should protect adequately all primary and existing secondary operations in and adjacent to the 219-220 MHz band. We invite comment on these assessments and proposals.

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[20] Amateurs could identify AMTS stations either through contacting the AMTS licensee(s) in the areas in which they plan to operate or through the Commission's data base of AMTS stations. Also, the ARRL could voluntarily assist the amateurs to identify AMTS licensees.

[21] Atlantic Research Corporation's study states that in worst case conditions a 120 km separation distance should prevent co-channel interference and in a typical case the necessary separation is only 70 km. We believe that under some circumstances interference could be caused at a greater distance, and therefore are proposing a notification requirement for amateur operations within 240 km of areas served by AMTS.

[22] *See* 47 C.F.R. § 97.201(c).

[23] If the coordinator recommends the new station over a station that already is in operation, it is still the non-recommended station's responsibility to resolve the interference problem.

[24] 47 C.F.R. § 97.201.

[25] 47 C.F.R. § 97.307(f).

V. PROCEDURAL MATTERS

32. *Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action. This action is being taken to provide a secondary allocation to the amateur service for amateur auxiliary station (point-to-point) packet backbone networks and other amateur point-to-point fixed communications. We believe this service is in the public interest and that the additional spectrum is needed to accommodate intercity amateur packet radio links in certain areas of the country. The proposed rules will protect from interference all primary and existing secondary users in and adjacent to the band that is proposed for allocation.

B. Objective. The objective of this proposal is to provide additional spectrum in which amateurs can establish wideband backbones to connect individual packet systems or use for other point-to-point fixed communications. This allocation will benefit the amateur services generally, including the emergency preparedness component of those services, as evidenced by a *Memorandum of Understanding* between ARRL and the National Communications System. Provision of this additional spectrum also will foster amateur experimentation with high data rates and spectrum efficiency.

C. Legal Basis. The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio as is in the public interest.

D. Descriptions, Potential Impact, and Number of Small Entities Affected. This proposal may provide new marketing opportunities for amateur radio equipment manufacturers, some of which may be small businesses. We invite specific comments on this matter by interested parties.

E. Reporting, Record Keeping and other Compliance Requirements. None.

F. Federal Rules which Overlap, Duplicate or Conflict with "this Rule. None.

G. Significant Alternatives. None.

33. *Other Matters*. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

34. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

35. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before June 15, 1993, and reply comments on or before July 15, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments must be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours at the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

36. For further information contact Mr. Tom Derenge at (202) 653-7605, Office of Engineering and Technology; or Mr. John Johnston at (202) 632-4964, Private Radio Bureau, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A PROPOSED RULE CHANGES

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulation is proposed to be amended as follows:

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

§ 2.106 Table of frequency allocations.

* * * *

a. Add a new footnote NG152 to column 5 of the 216-220 MHz band.

b. NG152 - The band 219-220 MHz also is allocated to the amateur service on a secondary basis for amateur auxiliary station (point-to-point) packet backbone networks and other amateur point-to-point fixed operations.

II. Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609; 3 U.S.T. 3450, 3 U.S.T. 4726, 12 U.S.T. 2377.

2. Section 80.385 is amended by adding a new paragraph (a)(3) to read as follows:

§ 80.385 Frequencies for automated systems.

* * * *

(a)(3) On a secondary, non-interference basis ship transmit frequencies in Group A & B may be used by amateur station licensees on a secondary basis for amateur auxiliary station packet backbone networks and other amateur point-to-point fixed operations. Amateur stations within 80 km (50 miles) of an AMTS coast station must obtain written approval from the AMTS licensee prior to operating on the Group A & B frequencies. Amateur stations between 80 and 240 km (50 and 150 miles) of an AMTS coast station must notify the AMTS licensee in writing at least 14 days prior to operating on Group A & B frequencies.

III. Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 97 continues to read as follows:

AUTHORITY citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.301(a) is revised by changing the third entry in the VHF Wavelength band to read as follows:

§ 97.301 Authorized frequency bands.

* * * *

(a) * * *

Wavelength band	ITU-Region 1	ITU-Region 2	ITU-Region 3	Sharing requirements see § 97.303 (Paragraph)
VHF	MHz	MHz	MHz	
* * *				
1.25 m	---	219-220	---	(a), (r)
-do-	---	222-225	---	(a)

* * * *

3. Section 97.303(r) is added to read as follows:

§ 97.303 Frequency sharing requirements.

* * * *

(r) In the 1.25 m band:

(1) No amateur station transmitting in the 219-220 MHz segment shall cause harmful interference to, nor is protected from interference due to operation of: (1) Automated Maritime Communications Systems, (2) broadcast television channels 11 and 13, (3) Interactive Video Distribution Service, (4) Land Mobile Services, or (5) any other service with a primary allocation in or adjacent to the band.

(2) No amateur station may transmit in the 219-220 MHz segment from a location that is within 80 km (50 miles) of an Automated Maritime Telecommunications System Coast Station unless the amateur licensee obtains written approval from that Automated Maritime Telecommunications System licensee. No amateur station may transmit in the 219-220 MHz segment from a location that is between 80 and 240 km (50 and 150 miles) of an Automated Maritime Telecommunications System Coast Station unless the amateur licensee notifies the AMTS licensee, in writing, of the amateur's intended operation at least 14 days before commencing transmissions.

4. Section 97.305(c) is revised by changing the third entry in the VHF wavelength band to read as follows:

§ 97.305 Authorized emission types.

* * * *

(a) * * *

(c) A station may transmit the following emission types on the frequencies indicated, as authorized to the control operator, subject to the standards specified in § 97.307(f) of this Part.

Wavelength band	Frequencies	Emission types authorized	Standards See § 97.307(f), Paragraph:
		* * * *	
1.25 m	219-220 MHz	Data	(6)
-do-	222-225 MHz	RTTY, data, test,	
		MCW, phone, image ..	(2), (6), (8)
		* * * *	

5. Section 97.313(h) is added to read as follows:

§ 97.313 Transmitter power standards.

* * * *

(h) No station may transmit with a transmitter power exceeding 50 W PEP on the 219-220 MHz segment of the 1.25 m band.

* * * *

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

FCC 93-92

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

Released: February 16, 1993

COMMISSION INSTRUCTS GENERAL COUNSEL TO SUPPORT REMAND IN *ARKANSAS AFL-CIO, INC. v. FCC*

The Commission has instructed the General Counsel to file a pleading supporting a remand in *Arkansas AFL-CIO, Inc. v. FCC,* No. 92-1115 (8th Cir.). The purpose of the remand would be to allow the Commission to give further consideration to whether Congress codified the fairness doctrine when it amended Section 315 of the Communications Act in 1959.

This case arose from a complaint filed with the Commission against station KARK-TV, Little Rock, Arkansas. In the course of ruling on that complaint, the Commission agreed with a decision of the District of Columbia Circuit that the fairness doctrine had not been codified by Congress when it amended Section 315 of the Communications Act in 1959. *Arkansas AFL-CIO, Inc.,* 7 FCC Rcd 541 (1991). In a December 1992 decision, the United States Court of Appeals for the Eighth Circuit, with one judge dissenting, affirmed the conclusion that Congress had not codified the doctrine. *Arkansas AFL-CIO, Inc. v. FCC,* 980 F.2d 1190 (8th Cir. 1992).

In the pleading, which was filed at the court's request and responded to a petition for rehearing of the Court's December decision, the Commission observed that "whether the 1959 amendment to Section 315(a) codified the fairness doctrine is an issue that has sharply divided judges in recent years." The Commission noted the division among the three judges in this case as well as the division among a number of judges on the D. C. Circuit in a 1986 case. The Commission said that it now believed "that there is no clear congressional intent on this point." Therefore, the Commission requested that the court remand this case so that the FCC could give further consideration to the proper construction of the statute in order to "facilitate a final resolution of this issue by the courts."

Action by the Commission February 12, 1993 by Public Notice (FCC 93-92). Commissioners Barrett and Duggan, with Commissioner Quello (Chairman) dissenting. Commissioner Marshall not participating.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93R-9

MM Docket No. 90-375

In re Applications of		
FOX TELEVISION STATIONS, INC.	)	File No. BRCT-880801LW
	)	
For Renewal of License of Station KTTV(TV) Los Angeles, California	)	
	)	
and	)	
	)	
RAINBOW BROADCASTING, INC.	)	File No. BPCT-881101KH
	)	
For Construction Permit for a New Commercial Television Station in Los Angeles, California	)	

Appearances

William S. Reyner, Jr., Richard S. Rodin, Mace J. Rosenstein, on behalf of Fox Television Stations Inc.; Robert Lewis Thompson, Louise Cybulski, on behalf of Rainbow Broadcasting, Inc.; and Norman Goldstein, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: March 8, 1993 ; Released: March 10, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Member BLUMENTHAL:

1. The Board has before it the Initial Decision, 7 FCC Rcd 3801 (1992)(I.D.), of Administrative Law Judge Joseph Chachkin (ALJ) granting the license renewal of KTTV-TV, Channel 11, Los Angeles, California and denying the mutually exclusive application of Rainbow Broadcasting, Inc. for a new Construction Permit to operate on that same frequency. Also before the Board

are the exceptions of Rainbow and replies thereto filed by Fox Television Stations, Inc. and the Commission's Mass Media Bureau. Finally, we have a motion to reopen the record and to enlarge the issues filed by Rainbow, oppositions thereto filed by Fox and the Mass Media Bureau, and a reply to those oppositions filed by Rainbow. Oral Argument was held before the Board on November 6, 1992. As modified for the reasons set forth below, and although we hold that Fox has violated FCC strictures which detract from its "renewal expectancy," we nonetheless affirm the I.D.'s grant of the license renewal of KTTV-TV.

INITIAL DECISION

2. By Hearing Designation Order, 5 FCC Rcd 5255 (M. Med. Bur. 1990), the following issues were designated for hearing [1]:

> 1. To determine with respect to the bank commitment letter of Bank of America to Rainbow Broadcasting.
>
> > a. the terms and conditions with respect to rate of interest and collateral, if any, for the proposed loans;
> >
> > b. the duration and terms and conditions for repayment of the loan;
> >
> > c. whether, in light of the evidence adduced pursuant to (a) and (b) above, the bank letter establishes a present firm intent to lend the necessary funds for construction;
> >
> > d. whether, in light of all the evidence adduced above, the applicant is financially qualified.

---

[1] Issue 1 was designated pursuant to a random system of financial certification auditing specified in Certification of Financial Qualifications for Broadcast Station Construction Permits, 2 FCC Rcd 2122 (1987). Because of continued abuse of its certification process, which required only the "checking" of a box, the Commission ultimately abandoned its certification procedure and reintroduced a requirement for a palpable financial showing. See Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853, 3858 (1989). Rainbow's instant application was filed under the old certification regime. See I.D., para. 136 (application filed November 1, 1988).

2. To determine with respect to Rainbow Broadcasting, Inc. whether there is a reasonable possibility that the tower height and location proposed by it would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

By Order, FCC 91M-1129, released March 16, 1991, the ALJ added an additional issue against Rainbow [2]:

To determine whether Rainbow Broadcasting, Inc. is financially qualified.

Prior to hearing, the ALJ granted summary decision on Issue 2, above, finding no air hazard. Memorandum Opinion and Order, FCC 90M-3426, released October 16, 1990. Fox does not except to that action.

3. In the main, however, and relying upon the precepts enshrined in Cowles Broadcasting, Inc., 86 FCC 2d 993 (1981), aff'd sub nom. Central Florida Enterprises, Inc., 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983), the ALJ concluded that Fox had been responsive to the problems, needs and interests of its community of license and that its license term performance [3] entitled it to a "strong renewal expectancy preference" that was "controlling as to the comparative choice between Fox and Rainbow." I.D. at para. 202. In any event, and pursuant to Issue 1, above, the ALJ concluded that Rainbow had not demonstrated reasonable assurance of a firm commitment of a $10 million loan from Bank of America when, by amendment, it affirmatively certified the financial section of its application, thereby disqualifying it for a new construction permit. Id., paras. 203-213. Finally, the ALJ concluded that Rainbow's amendment of February 6, 1991 to substitute reliance for its financing to Far East National Bank in lieu of Bank of America was impermissible and, as

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[2] Unlike Issue 1, which is directed to the question of whether Rainbow met the Commission's financial requirements at the time it certified, this second issue was added to determine whether Rainbow was later qualified when it ceased reliance on Bank of America for its financing and interposed instead a purported commitment from Far East National Bank. See I.D., para. 173 et seq.

[3] Fox became the licensee of KTTV-TV on March 6, 1986, when it acquired the facility from Metromedia Radio & Television, Inc.; the KTTV-TV license term under scrutiny expired on November 30, 1988. See I.D. at paras. 2, 10. Ordinarily, a television license term runs for 5 years. See 47 U.S.C. § 307(c) (as amended 1982).

it happens, futile since Far East was $6 million short of Rainbow's loan figure. Id., paras. 214-216.

4. As discussed in far greater detail below, Rainbow excepts to all of these conclusions. It claims that [4]:

> The I.D. ... errs in finding that Fox was entitled to a renewal expectancy for KTTV. Fox systematically eliminated most of KTTV's regularly scheduled non-entertainment programming during the license term, including most of the shows listed in the Initial Decision as examples of Fox's allegedly "superior" service. Toward the end of the license term, KTTV broadcast only one, 30-minute live news show daily and only one, 30-minute public affairs show weekly, a total of less than 2 percent total news and public affairs programming.

Further, Rainbow contends that the I.D. erred in disqualifying it "on two bogus financial grounds." [5] Rainbow also interjects numerous claims of procedural and substantive error by the ALJ during this proceeding, including matters relating to equal employment at KTTV-TV, alleged reporting, cross-interest and public file violations, as well as the ALJ's refusal to permit deposition of certain Fox officials or to present certain of its own witnesses. [6] For its part, and while filing no exceptions to the I.D., the Bureau refreshes its belief "that the [I.D.] erred in failing to diminish Fox's renewal expectancy" because of a reduction in the quantity of nonentertainment programming on KTTV-TV during the license term, [7] a postulate the ALJ rejected. See I.D., para. 202. We now examine in finer fashion the exceptions and the record before us.

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[4] Rainbow Exceptions at ii.

[5] Id., at i.

[6] See id., at 21-25.

[7] Bureau reply at 16. Routinely, matters not saved by formal exceptions are waived before the Board. 47 CFR § 1.277(a). We know not why the Bureau filed no exceptions on this point, save for the fact perhaps that it concurs with the ALJ that Rainbow is financially disqualified. Because the Bureau makes an argument based on the licensee's programming which we must necessarily consider in connection with Rainbow's own exceptions and because the Commission generally overlooks the pleading failures of its own operating bureaus, see, e.g., TeleSTAR, Inc., 2 FCC Rcd 7352 (1987)(acceptance of bureau comments filed 6 months late), we will address the Bureau's remarks in the context of our discussion of KTTV-TV's performance.

EXCEPTIONS

KTTV-TV LICENSE TERM PERFORMANCE

5. In exordium, it is salutary to rehearse the regulatory standards by which performance must be measured, and then factored, in a comparative renewal proceeding. After rebuffing the Commission in the first round, [8] the Central Florida Enterprises court subsequently undertook a concordat, albeit qualified, with the Commission on the operative dynamics of a "renewal expectancy" for an incumbent licensee, a concept presaged by the Circuit in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), and acknowledged by the Supreme Court in FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 782 & n.5 (1978). In Central Florida, the judges accepted as "permissible" the following formulation:

> In our view [states the FCC], the strength of the expectancy depends on the merit of the past record. Where, as in this case, the incumbent rendered substantial but not superior service, the 'expectancy' takes the form of a comparative preference weighed against [the] other factors . . .
>
> An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no preference. This is to be contrasted with Commission's 1965 Policy Statement on Comparative Broadcast Hearings, where "[o]nly unusually good or unusually poor records have relevance."

683 F.2d at 506 (internal footnote citation omitted). At the same time, the court monished: (1) that the Commission must not "raise[ ] renewal expectancy to an irrebuttable presumption in favor of the incumbent," but rather that any such "renewal expectancy will be factored in for the benefit of the public, not for incumbent broadcasters" [9]; and (2) that in defining levels of an incumbent's service so as to assign any weighted renewal expectancy preference, the Commission's standards must not "be 'opaque to judicial review,' 'wholly unintelligible,' or based purely on 'administrative feel.'" [10]

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[8] See Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978)(Central Florida I), cert. dismissed, 441 U.S. 957 (1979). Accord Monroe Communications Corp. v FCC, 900 F.2d 351, 359 (D.C. Cir. 1990)("The Commission appears to act as if incumbency and the renewal expectancy were a property right -- which it is not.")(Silberman, J., concurring)(original emphasis).

[9] 683 F.2d at 507 (original emphasis).

[10] Id., at 508 (footnotes omitted).

6. In the slipstream of Central Florida, this Review Board has had many occasions to apply its gametic principles. Often, by the Board's reckoning, an incumbent has been ousted and supplanted by a license challenger. See, e.g., KQED, Inc., 3 FCC Rcd 2821 (Rev. Bd.), review denied, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991), aff'd per judgment sub nom. California Public Broadcasting Forum v. FCC, 947 F.2d 505 (D.C. Cir. 1991); Tri-State Broadcasting Co., Inc., 5 FCC Rcd 1156 (Rev. Bd. 1990), recon. denied, 5 FCC Rcd 3727 (1990), review denied, 6 FCC Rcd 2604 (1991); United Broadcasting Co., Inc., 94 FCC 2d 938 (Rev. Bd. 1983), modified, 57 RR 2d 885 (1985); George E. Cameron Jr. Communications, 91 FCC 2d 870 (Rev. Bd. 1982), recon. denied, 93 FCC 2d 789 (1983). And often an incumbent has prevailed. See, e.g., Metroplex Communications, 4 FCC Rcd 8149 (Rev. Bd. 1989), review denied, 5 FCC Rcd 5610, aff'd per judgment sub nom. Southeast Florida Limited Partnership v. FCC, 947 F.2d 505 (D.C. Cir. 1991); Seattle Public Schools, 4 FCC Rcd 625 (Rev. Bd. 1989); Valley Broadcasting Co., 4 FCC Rcd 2611 (Rev. Bd. 1989), review denied, 5 FCC Rcd 499 (1990), aff'd per judgment sub nom. William H. Hernstadt v. FCC, 919 F.2d 182 (1990); Intercontinental Radio, Inc., 98 FCC 2d 608 (Rev. Bd. 1984), review denied, 100 FCC 2d 817 (1985); Tele-Broadcasters of California, Inc., 58 RR 2d 223 (Rev. Bd. 1985). Recently, the court found that the Commission had not properly considered the late-term format change to "wall-to-wall" subscription television by an incumbent licensee, which licensee "[b]y the end of the license term ... had essentially closed down its production facilities," Monroe Communications Corp. v. FCC, 900 F.2d 351, 354 (D.C. Cir. 1990)(remanding comparative renewal decision), thereby "effect[ing] a wholesale abandonment of public service programming ... ." I.D. at para. 202 (ALJ describing his own prior findings in Monroe proceeding).[11]

7. Attuned acutely to Central Florida's injunction that this agency's assessment of an incumbent licensee's performance must not partake of all hat and no cattle, 683 F.2d at 508 & n.27, the Board used the occasion of Seattle Public Schools to canvass the skein of Central Florida progeny and identify those objective factors previously consulted by the Commission, and the court upon review, to assay whether an incumbent's performance had been, for instance, "substandard," or "substantial," or "meritorious," or "superior." Based upon our survey of comparative renewal precedent to that point, the Board identified five discrete elements that had been considered in prior adjudications, which we synthesized in Metroplex as follows [12]:

> Criterion 1. The licensee's efforts to ascertain the needs, problems and interests of its community;
>
> Criterion 2. The licensee's programmatic response to those ascertained needs;

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[11] The Commission ALJ presiding in the instant case, Joseph Chachkin, also presided in Video 44, 102 FCC 2d 419 (ALJ 1985), wherein he found the incumbent licensee entitled to no renewal expectancy. Monroe Communications, 900 F.2d at 354.

[12] 4 FCC Rcd at 8151.

> Criterion 3. The licensee's reputation in the community for serving the needs, problems and interests;
>
> Criterion 4. The licensee's record of compliance with the Communications Act and FCC rules and policies; and
>
> Criterion 5. The presence or absence of any special effort at community outreach or towards providing a forum for local self-expression.

8. In its oversight of Metroplex, however, the Commission opined that, in determining that the incumbent there had rendered "sound, favorable" service warranting a "renewal expectancy":

> the Board stated the relevant criteria in a manner somewhat at variance with the Commission's own general statements of these criteria. In particular, the Board separately listed the ascertainment of the community's needs and "community outreach" as among the relevant criteria, which the Commission has not explicitly done in its own general statements of the relevant criteria. Compare Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 4 FCC Rcd 6363, 6368 n.11 with Metroplex Communications, Inc., 4 FCC Rcd at 8151 ¶ 16. Nonetheless, despite this discrepancy in the Board's general statement of the relevant criteria, the Board's specific evaluation and discussion of the record is consistent with Commission precedent.

5 FCC Rcd at 5611. In the aforecited footnote 11 to its 1989 Formulation of Policies and Rules, the Commission had outlined that:

> [i]n determining the renewal expectancy weight, the Commission has looked primarily at (1) the amount of non-entertainment programming presented, the time of day it is presented and whether it is directed to local needs and interests, (2) the amount of locally produced programming, and (3) the reputation of the station in the community. See, e.g., Radio Station, WABZ, Inc., 90 FCC 2d 818, 840-42 (1982), aff'd sub nom. Victor Broadcasting v. FCC, 722

F.2d 756 (D.C. Cir. 1983).

The ALJ referenced that same footnote 11 in his estimate of KTTV-TV's performance record, but Rainbow submits that [13]:

> [a]fter initially citing correctly the three legal criteria used by the FCC to determine whether to award a "renewal expectancy" (I.D. at ¶ 187), the I.D. erroneously proceeds both to consider extraneous factors 35/ and, more importantly, to functionally disregard these very legal criteria in concluding that Fox's mediocre service record equates to "substantial service," deserving of a "strong" renewal preference (I.D. at ¶¶ 188-202).
>
> ---
>
> 35/ The I.D.'s references to Fox's ascertainment efforts (¶¶ 1188-9) are legally irrelevant to the renewal expectancy issue. Likewise, "community outreach" (I.D. at ¶¶ 90-101) is irrelevant because it bears no direct relationship to programming. See Metroplex Communications, Inc., 5 FCC Rcd 5610, 5611 ¶ 10 (1990) (ascertainment efforts and community outreach not relevant). Even Fox agrees. See Fox's Proposed Conclusions at ¶ 183, n.16.

Because it is imperative that, at a minimum, the parties hereto, and any reviewing authority, have the benefit of uniform and expressly articulated standards of performance measurement, see generally Central Florida, supra, we will discuss what Metroplex labeled a "discrepancy" in the exposition of applicable criteria.

9. After metabolizing the Commission's language in Metroplex and all other material relevant to license "renewal expectancy," including the subject footnote in its 1989 Formulation of Policies and Rules, the Board believes that the five criteria adumbrated in Seattle Public Schools continue to be the proper yardstick against which to measure the entitlement to, and strength of, any "renewal expectancy," with a qualification relating to the "ascertainment of community needs" discussed more fully infra paras. 13-14. We base our conviction on two grounds that seem persuasive: first, and though the Metroplex language cited by Rainbow is without question enigmatic, it is instructive, we think, that the Commission explicitly declaimed that "the Board's specific

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[13] Rainbow Exceptions at 16.

evaluation and discussion of the record is [sic] consistent with Commission precedent." Since it is a nuclear tenet of administrative law, well known we are sure to the Commission, that an agency not depart from established precedent without a reasoned explanation, see, e.g., Office of Communications of United Church of Christ v. FCC, 911 F.2d 803, 809 (D.C. Cir. 1990); Alegria I, Inc. v. FCC, 905 F.2d 471, 474-75 (D.C. Cir. 1990); Ventura Broadcasting Co. v. FCC, 765 F.2d 184, 190 (D.C. Cir. 1985), and inasmuch as the Commission's passing Metroplex commentary makes no pretense of being a reasoned explanation for a leave of its own precedent, we will not follow Rainbow and shift with ambiguous dicta. Second, the cursory footnote in the 1989 Formulation of Policies and Rules comes in the context of a (third) notice of inquiry and proposed rulemaking looking toward altering the agency's comparative renewal standards. Et sic pendet. No further action has been taken in that docket, and the footnote to that mere notice, while very loosely alluding to performance benchmarks, is not based on a thorough discussion of relevant comparative renewal precedent and does not purport to be a definitive explication thereof. While sufficient for its purpose of further inquiry, that quick footnote is hardly the grail that Rainbow signals for homage. Again, and as the Commission held in Metroplex, the criteria applied in that renewal case were wrought of precedent, which precedent shall control unless and until purposefully altered by the Commission, perhaps in the eventual culmination of its unfinished 1989 inquiry and rulemaking. Pending that, we press on, and review the instant record in accordance with the case law the Central Florida court anticipated would be necessary to "flesh out" the "renewal expectancy" calculus in which it had fundamentally acquiesced. See 683 F.2d at 508.

10. Ascertainment of Community Needs and Problems. Paragraphs 17-31 of the I.D. describe the manner in which Fox approached its journey to discover the needs, problems and issues facing its community of license, as well as its larger service area. [14] These fourteen paragraphs reflect an elaborate and continuous system at KTTV-TV for discerning salient issues in the station's five-county service area. In synopsis, seventeen station managers and department heads were tasked to discuss local issues with community leaders. During the truncated license term under scrutiny, "KTTV conducted a total of 269 formal ascertainment interviews with community leaders," I.D., at para. 19, those leaders reflecting a broad spectrum of interests [15] as well as "racial,

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[14] See Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972).

[15] At I.D., para. 22, the ALJ listed the specialized interests of those leaders by category, and he registered them as follows:

Community Category	Number of Community Leaders
1. Agriculture	4
2. Business	23
3. Charities	14
4. Civic/Neighborhood	13
5. Consumer Services	3
6. Culture	7

ethnic, culture [sic] and geographic diversity." I.D. para. 23. [16] Moreover, [17]:

7.	Education	25
8.	Elderly	5
9.	Environment	17
10.	Gay	1
11.	Government	1
12.	Handicapped	39
13.	Labor	6
14.	Military	24
15.	Minority/Ethnic	24
16.	Professions	6
17.	Public Safety/health	33
18.	Recreation	9
19.	Religion	7
20.	Youth/Students	16
21.	Women	3

See also id., where the ALJ stated:

> The community leaders interviewed by KTTV during the renewal period included representatives of minority and women's group community organizations, educational institutions including the public schools, religious organizations, the arts, local, state and federal governments, and the private business sector.

[16] Therein, the breakdown was as follows:

Hispanic:	35 percent
Black:	15 percent
Asian:	5 percent
Indian:	1 percent

See also I.D. at para. 24, where the ALJ recorded:

> The geographic distribution of ascertainment interviews throughout KTTV's five county service area was as follows:

Los Angeles:	53 percent
Orange:	26 percent
San Bernardino:	16 percent
Riverside:	3 percent
Ventura:	1 percent

[17] I.D. at para. 21.

> KTTV supplemented its formal ascertainment program through interviews with guests on its regularly scheduled public affairs and news programs, and through informal contacts with community leaders by the station's Public Affairs Director, who attended community functions throughout the station's service area. These included community center openings, professional organization meetings, cultural events, fundraisers, awards presentations, special interest group meetings, and media public service seminars and meetings. The Public Affairs Director also participated as a guest speaker and moderator at community events. The Public Affairs Director submitted written reports to the Program Director of her attendance at and participation in community events (Fox Ex. 2. p.2).

11. The process did not cease with those measures. The ALJ reported [18]:

> The numerous concerns identified by KTTV's ascertainment interviews were incorporated into the station's program planning process on an ongoing basis. KTTV's Public Affairs Director reviewed and analyzed the completed ascertainment on a monthly basis.

Additionally [19]:

> KTTV's Program Director, on the basis of the concerns specified by community leaders, then determined the most significant categories of problems and needs to be addressed by the station (Fox Ex. 2, p.5).

And [20]:

> During the renewal period, the specific concerns expressed by community leaders generally were encompassed within the following categories of significant

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[18] Id., at para. 23.

[19] Id., at para. 26.

[20] Id., at para. 27.

problems and needs:

1. Social Services/Government
2. Educational/Recreation/Family
3. Crime/Law
4. Minorities/Immigration
5. Transportation/Traffic/Repairs
6. Environment/Energy/Pollution
7. Substance Abuse/Health
8. Women/Elderly/Handicapped
9. Economy/Inflation/Unemployment
10. Housing/Urban Renewal

12. The process did not cease with those measures either. The ALJ next found [21]:

> Each quarter during the renewal period, KTTV prepared and placed on its Public File a list of the programming the station had provided a response to the ascertained problems and needs of greatest significance to the station's viewers. Fox Exhibits 3-8 provided representative examples of the types and scope of programming presented to KTTV to address the various concerns of its service area during the renewal period (Fox Ex. 2, p.6).

He further commented that at KTTV-TV:

> [t]he ascertainment process served not only as a vehicle for monitoring local problems and concerns affecting the various segments of KTTV's audience, but also as a way to maintain a dialogue with community leaders. Thus, for example, ascertainment interviews were at times preceded by a brief introductory presentation about obtaining public service and public affairs time on KTTV, and copies of the station's PSA brochure were distributed.

In sum, the ALJ found this interactive process to be "continuous" throughout the license period, I.D. at para. 17, indeed "exhaustive." Id., at para. 200.

13. Discussion. Rainbow does not dispute in the slightest the ALJ's lengthy accounting of Fox's efforts to elicit the needs, problems and issues of its service area. Instead, as we quoted earlier, Rainbow maintains that these efforts were "legally irrelevant to the renewal expectancy issue." We disagree. It is accurate, as the ALJ mentioned in para. 18 of the I.D., that licensees are

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[21] Id., at para. 30.

no longer required to conduct the vast and costly ascertainment of community leaders that preceded a deregulation of the television industry. See Commercial TV Stations, 98 FCC 2d 1076, 1098-1101 (1984). There borrowing from its earlier radio deregulation, the Commission eliminated its formal ascertainment obligation and it held that a licensee need only compile a quarter-annual list of community issues and programs responsive thereto, and retain that list in its public file. Id., at 1109-10. [22] While even these lists need not document the licensee's method of unearthing the said community issues, [23] the Commission advised (id., at 1110):

> In a contested license renewal the burden of proving that programming relevant to public issues has been provided is on the licensee. A broadcaster must demonstrate, if called on to do so, in a hearing or otherwise, that it has met its responsibility in this regard.

It is plain that, inasmuch as the Commission's performance touchstone remains a licensee's responsiveness to community issues, see id., at 1101 & n.38, a licensee may -- or if challenged it must -- show how and what it is responding to. Consequently, although Rainbow cites to Metroplex for the proposition that a licensee's ascertainment of community problems is irrelevant, the Metroplex Commission itself declared with respect to that challenged licensee:

> We also find that WHYI-FM made a "diligent,

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[22] This requirement is codified at 47 CFR §73.7526(a)(8).

[23] See 98 FCC 2d at 1110, which explains:

> In the context of a routine license renewal, the existence of the issues/programs list in the station's public file will give the Commission sufficient assurance that the station has met its issue-responsive programming responsibility during the past license term to grant license renewal on that issue. In other contexts, such as when a programming issue is raised in a petition to deny or in a comparative renewal, these lists will serve as a significant source of information for any initial investigation by a member of the public or by the Commission. If in a particular case, a station's issues/programs lists do not provide sufficient information to resolve a substantial question of fact, the Commission may ask, as it has in the past, for more information from the licensee.

> positive, and continuing effort to discover and fulfill the tastes, needs, and desires of [its] community or service areas." WPIX, Inc., 68 FCC 2d 381, 400 ¶ 56 (1978).

5 FCC Rcd at 5611 (footnote omitted). [24]

14. Thus, simply because a licensee is not required to engage in as thoroughgoing a regimen as Fox conducted at KTTV-TV, that does not mean that the ALJ erred in considering the evidence so as to evaluate whether Fox had executed its obligation to identify significant issues in a manner that might have "minimally" complied with the lesser burden of the Commission's 1984 television deregulation package, or whether it had done less or more. In fact, it is represented that Rainbow itself never objected to the introduction of this enormous body of evidence, nor did it present rebuttal evidence or question

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[24] The Board's earlier decision in Metroplex had tracked the history of this fundamental obligation, citing En Banc Programming Inquiry, 44 FCC 2303, 2312 (1960). See also Deregulation of Radio, 84 FCC 2d 968, 981 (1981), aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ V. FCC, 707 F.2d 1413 (D.C. Cir. 1983). That essential standard endures. See, e.g., Simon Geller, 90 FCC 2d 250, 271 (1982) ("the licensee's responsiveness to the ascertained problems and needs of its community remains 'central'"). Accord Tele-Broadcasters of California, Inc., 58 RR 2d 223, 229-230 (Rev. Bd. 1985); Pillar of Fire, 99 FCC 2d 1256, 1259-1260 (Rev. Bd. 1984), review denied, 2 FCC Rcd 519 (1987); Intercontinental Radio, Inc., 98 FCC 2d 608, 631-637 (Rev. Bd. 1984), modified, 100 FCC 2d 817 (1985); Kaye-Smith Enterprises, 98 FCC 2d 675, 683-684, recon. denied, 98 FCC 2d 670 (Rev. Bd. 1984), review denied, FCC 85-192, released April 15, 1985, aff'd by judgment sub nom. Hoffart v. FCC, 787 F.2d 675 (D.C. Cir. 1986); Broadcast Communications, Inc., 93 FCC 2d 1162, 1166-1169 (Rev. Bd. 1983), modified, 97 FCC 2d 61 (1984), aff'd by judgment sub nom. Genesis Broadcasting Ltd. v. FCC, 759 F.2d 959 (D.C. Cir. 1985), cert denied, 474 U.S. 946 (1985).

At 4 FCC Rcd at 8151, the Metroplex Board recited:

> The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this he has met his public responsibility.

Fox's witnesses on any aspect of the process.[25] It comes, then, with some ill grace for Rainbow to lift this belated plaint, and we concur with the ALJ that the record evidence here shows an extraordinary attention to the adduction, at least, of public issues confronting the KTTV-TV service area. As we stressed in Metroplex, however, the adduction of community issues is merely the preliminary step; the associated criterion is whether, and how, the licensee translated its ascertainment into on-air performance. See id., 4 FCC Rcd at 8152 (incorporation of ascertainment into actual programming is critical).

15. Programming Responsive to Ascertained Needs. The mechanism employed by Fox to ensure a nexus between issue identification and responsive programming was narrated by the ALJ:

> The numerous concerns identified by KTTV's ascertainment interviews were incorporated into the station's program planning process on an ongoing basis. KTTV's Public Affairs Director reviewed and analyzed the completed ascertainments on a monthly basis. Periodic statistical tabulations or narrative summaries of ascertainment data were provided to KTTV's Program Director, as follows:
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> | | |
> |---|---|
> | April 1986 | June 1987 |
> | May 1986 | July 1987 |
> | June 1986 | January 1988 |
> | July 1986 | March 1988 |
> | August 1986 | April 1988 |
> | November 1986 | July 1988 |
> | March 1987 | September 1988 |
> | April 1987 | |

I.D. at para. 25. Moreover, (id., at para. 26):

> KTTV's Program Director, on the basis of the concerns specified by community

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[25] Fox Reply at 13. We daresay that, considering precedent, had Fox not demonstrated serious devotion to eliciting community issues, Rainbow might well have drawn invidious comparisons to the licensee in Metroplex (and many previous comparative renewal incumbents) and demanded a "renewal expectancy" diminution. Unlike the challenger in Metroplex, however, Rainbow does not describe Fox's ascertainment as "perfunctory," see 4 FCC Rcd at 8152, nor equitably could it.

> leaders, then determined the most significant categories of problems and needs to be addressed by the station (Fox Ex. 2, p.5).

16. In fifty-four ensuing paragraphs, the ALJ chronicled the programming provided by Fox in its effort to demonstrate issue-responsive programming. Because Rainbow does not dispute the station's presentation of this programming, or claim that the great bulk of it was not tethered directly to ascertained needs, [26] and because the ALJ has fairly described that programming at prodigious length, we need not reproduce it in detail but incorporate by reference those segments of the I.D., paras. 32-86. Suffice it that the programming evidence consisted of regularly scheduled news and public affairs programming, periodic "specials," and public service announcements (PSAs), all tied very specifically to the ten issues adduced by Fox (and reprinted supra at para. 11 of our text). See, e.g., I.D., paras. 32-43. KTTV-TV's news programs were described in paras. 47-57, and the ALJ also noticed (id., at para. 45; footnote omitted):

> During the renewal period, KTTV's News Department employed an average of 24 newspersons (reporters), 17 professionals (producers, directors, writers, assignment editors, and graphic artists) and 17 technicians. The station augmented its coverage of national and international developments with news feeds from Cable News Network and the news departments of other Fox-owned stations. Additionally, in the Fall of 1987, KTTV established a New Bureau in Orange County, California, in order to expand its coverage in the southern portion of its service area (Fox Ex. 4, pp.1-2).

Further (id., at para. 46):

> During the renewal period KTTV acquired both hardware and software to improve the efficiency and effectiveness of its news

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[26] We do concur with Rainbow that the programs described in the I.D. at paras. 65-69, which it characterizes as "sports, parades and award shows," Rainbow Exceptions at 18 n.43, appear unrelated to the 10 issues identified by Fox (and reprinted supra at para. 11 of our text), or to any serious public issues for that matter. In Judge Silberman's concurrence to Monroe Communications, the jurist quipped that he already felt "somewhat like Alice in Wonderland." 900 F.2d at 359. We have no intention in leading comparative case law through a parade of parades, only to colorize Judge Silberman's "Looking Glass." The Board gives no consideration whatever to such programming, and accepts Rainbow's exception on the point.

> operation. For example, the station leased a helicopter for the exclusive, full-time use of the News Department (Tr. 483-484), purchased its first satellite news gathering (SNG) truck, capable of originating live programming, and acquired an additional microwave-linked mobile news gathering (ENG) van to expand its existing fleet of such vehicles. KTTV also computerized its News Department, which, as noted above, was interconnected with its counterparts at other Fox-owned television stations (Fox Ex. 4, p.2).

17. Moreover, the ALJ considered a variety of news and public affairs "specials," see id., paras. 58-59, many of which were directed either to children or related to children's concerns. See also id., paras. 71-75 (additional children's programming). At paras. 76-81 of the I.D., the ALJ recounted the public service announcements presented by KTTV-TV, some Fox-produced and some produced by local civic and cultural organizations. Withal (id., at para. 82):

> Between March 6 and December 31, 1986, KTTV broadcast 8,008 PSAs (approximately 26 per day), of which approximately 88% ran between 6:00 a.m. and 12:00 midnight. During this period, PSAs were broadcast on behalf of 319 different organizations. In 1987, KTTV broadcast 9,928 PSAs (approximately 27 per day), of which approximately 81% ran between 6:00 a.m. and 12:00 midnight. During 1987, PSAs were broadcast on behalf of 377 different organizations. Between January 1 and November 30, 1988, KTTV broadcast 9,264 PSAs (approximately 27 per day), of which approximately 76% ran between 6:00 a.m. and 12:00 midnight. During this period, PSAs were broadcast on behalf of 336 different organizations. (Fox Ex. 8, pp. 10-151).

After absorbing this entire record, the ALJ concluded (id., at para. 202):

> Thus, the record demonstrates that KTTV conducted exhaustive ascertainment interviews, supplemented by information derived through extensive community involvement; broadcast a multitude of PSAs on behalf of hundreds of different organizations; presented numerous regularly scheduled and special news, public affairs and general interest programs; provided an

> effective array of forums for community members and leaders with its locally produced public affairs programs, editorials and PSA production and broadcasts; provided coverage of events of special interest to its community; continuously reached out into the Los Angeles community to promote, organize and support community and charitable activities; and maintained an excellent reputation in the community, unblemished by any criticism.

18. Despite what would seem, as the ALJ signified in his favorable appraisal of the programming record of KTTV-TV accomplished over a relatively short two-and-half-year period, a most impressive record of responsiveness to public issues, Rainbow advances a farrago of exceptions to the ALJ's treatment of this key criterion. Foremost, we believe, is Rainbow's contention that the ALJ failed to appropriately calculate the "downward trend" in nonentertainment programming: it claims that most of the public affairs shows "inherited from prior licensee Metromedia" were cancelled by Fox during the remainder of the license term, "often because they were too expensive" [27]; that "[t]oward the end of the license term, KTTV broadcast only one, 30-minute live news show daily and only one, 30-minute public affairs show weekly, a total of less than 2 percent total news and public affairs programming" [28]; and that "Fox appears to be one of the few incumbents in FCC history to choose not to even attempt to prove the 'superiority' of its programming record by presenting evidence of its past performance relative to other stations." [29] Invoking Monroe Communications, supra, and "while Rainbow does not argue that KTTV's 'downward trend' was the worst in FCC history," [30] Rainbow maintains [31]:

> Not only have the Courts and the FCC historically found an incumbent's performance in the later part of a license term to be most predictive of its likely future performance, a pattern of marked reduction in non-entertainment programming during the license term clearly "negates" any entitlement to a renewal expectancy.

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[27] Rainbow Exceptions at 16.

[28] Id., at ii.

[29] Id., at 19 (original emphasis).

[30] Id., at 18 (original emphasis).

[31] Id. (footnotes omitted).

19. Rainbow's collateral arguments, [32] insofar as related to the record of responsive programming, are these: (1) that K. Rupert Murdoch, who through his control of Twentieth Holdings, Corp. also controls Fox Television, Inc., and Barry Diller, (then) Chairman of Fox Television, [33] engaged in "micromanagement" of KTTV-TV's news, which (2) according to former KTTV general manager Robert Morse led the station to deemphasize nonentertainment programming. [34]

20. Whereas the Mass Media Bureau does not go so far as Rainbow to argue that the "downward trend" in nonentertainment programming "negates" a Fox "renewal expectancy," it submits that "the I.D. erred in minimizing the significance of the demonstrated decline in Fox's nonentertainment programming and in giving excessive weight to the licensee's community service efforts. Thus, even though there was no accompanying drastic change in format as in [Monroe Communications], the Bureau believes that Fox's renewal expectancy should have been diminished." [35]

21. In its defense, Fox rejoins that Monroe is inapposite, as that case turned on a "dramatic and permanent format change" to "wall-to-wall" subscription television. [36] It insists that Rainbow suffers to substitute its programming judgment for that of the licensee; that the cancellation of certain KTTV-TV programs was simply part of an ongoing analysis of its schedule and that "during the license term KTTV introduced four regularly scheduled public affairs programs and general interest programs responsive to its viewers' ascertained needs" [37]; that Rainbow does not question the ALJ's conclusion that KTTV-TV programming was completely responsive to ascertained needs ("as evidenced, in part, by numerous public commendations and awards," about which more infra paras. 30-36); and that its consolidation of news programming derived of an

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[32] Some of Rainbow's assaults on the programming record are picayune. E.g., Rainbow Exceptions at 16 n.38. ("Fox News At Ten" a 30-minute broadcast); id., at 17-18 & n.43 (one or more programs (unspecified) were broadcast after November 30, 1988 and some shift occurred in PSAs broadcast from 6:00 a.m. to 12:00 p.m.). As suggested by their footnote treatment by Rainbow, these have no decisional significance in the overall scheme of license term performance; Rainbow's larger complaint of a "downward trend," which we address in full, covers these matters adequately.

[33] See I.D., para. 7.

[34] See Rainbow Exceptions at 16-17.

[35] Bureau Reply at 17-18 (footnotes omitted; original emphasis).

[36] Fox Reply at 5 (quoting 900 F.2d at 355).

[37] Fox Reply at 6 (original emphasis). Fox also denies that it cancelled the children's program cited by Rainbow ("Dr. Science") as an example of a program deleted because it was "too expensive." See id., at n.6. It there claims that the show was cancelled for "lack of ratings." As far as we can see, the two often amount to the same thing.

attempt "to marshall[ ] our forces and our resources toward a quality product and competitive product in the marketplace." [38] Finally, in addition to its regularly scheduled news (which it simulcast in Spanish [39]) and public affairs programming, Fox reminds that, over the two-and-one-half-year period, it offered (1) "thirty-eight 30-or-60 minute news and public affairs specials," [40] as well as (2) "more than 28,000 PSAs on behalf of hundreds of different organizations." [41]

22. Discussion. At the outset, it is necessary to place in perspective the underlying policy tinder that fuels the clash between Fox and the ALJ, on one side, and Rainbow and the Mass Media Bureau on the other: whether any "renewal expectancy," and/or the strength thereof, is measured, reductively, by the quantity of nonentertainment programming broadcast by a licensee, either in absolute terms or in contrast to other stations. That is all this battle is about, really, and a short historical recap might be enlightening.

23. More than a decade-and-a-half ago, and citing 47 U.S.C. §326 (anticensorship provision), the District of Columbia Circuit rejected the entreaty of a citizens' group to require the FCC to establish quantitative standards for measuring the performance of a broadcast renewal applicant, and it held:

> As to petitioners' First Amendment claims [in favor of quantitative criteria], their approach would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission. The Act provides broadcasters with broad programming discretion and prohibits the Commission from exercising the power of censorship.

National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1978). The court went on to reason (id.; emphasis added):

> Petitioners claim that the lack of guidelines violates First Amendment principles because broadcasters are allegedly left to the "subjective" standards used in the ad hoc comparative renewal proceedings. In addition to the

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[38] Id., at 7 (quoting Tr. 579).

[39] Id., at 8 (citing I.D., para. 48).

[40] Id. (citing I.D., paras. 58-64).

[41] Id., at 4 (citing I.D. , para. 82).

> fact that the broadcasters themselves disagree with the petitioners, it is apparent that the limitation on the broadcasters' discretion that the guidelines would cause would not be balanced by a benefit of certainty or "objective" standards in the comparative renewal process. As was indicated above, even if the percentage guidelines were adopted, an ad hoc hearing would be required to weigh the effect of other factors in each individual case. In addition, the quantitative guidelines would limit editorial discretion without any guarantee of improved service.

Therein the court was responding to a challenge to the Commission's experience that attempting to measure a licensee's entitlement to a "renewal expectancy" on the bed of a quantitative scale was "a simplistic, superficial approach to a complex problem." Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process, 66 FCC 2d 419, 429 (1977).

24. The Commission again considered quantitative standards as a device for defining "substantial service in the comparative context," but found that there is "no valid nexus" between quantity and adequate broadcast service. Deregulation of Radio, 84 FCC 2d 968, 986 (1981), aff'd in pertinent part sub nom. Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). In its aforecited Commercial TV Stations, the Commission once more deliberated a quantitative measurement of performance, but in a further deregulatory mode the Commission expressly disclaimed this approach, electing instead to rely predominantly on marketplace forces to supply issue-responsive programming:

> We believe that licensees should be given this flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand. Such an approach not only permits more efficient competition among stations, but poses no real risk to the availability of these types of programming on a market basis. This is particularly true in view of the continuing obligation of all licensees to contribute issue-responsive programming and their responsibility to ensure that the strongly felt needs of all significant segments of their communities are met by market stations collectively. The current guidelines, while failing to have a significant impact on overall station

> performance, tend to restrict the freedom of individual licensees by requiring them to present programming in all categories. Such a requirement is unnecessary and burdensome in light of overall market performance.

98 FCC 2d at 1087-88. In all cases, the distinguished authorities rejecting a quantitative approach gestured obeisance to the Supreme Court's decree that "it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." Columbia Broadcasting System, Inc. v. FCC, 412 U.S. 94, 110 (1973)(quoted by the court in rejecting a quantitative approach to comparative renewals, see National Black Media Coalition, 589 F.2d at 581) (emphasis added). Accord National Broadcasting Co., 47 FCC 2d 803, 806 (1974). Indeed, in one comparative renewal case, the court affirmed the Commission's assessment that a challenged renewal applicant's record was "superior," entitling that incumbent to a "strong renewal preference," notwithstanding that the challenged FM station was (1) merely duplicating, by simulcast, the programming of a companion AM station; and (2) presenting approximately 180 hours of independent nonentertainment programming per year. The opinion said:

> We are being urged by Victor [the challenger] and the dissent to hold that 180 hours of independent non-entertainment programming can never be considered an acceptable level of service. To so hold would vastly and improperly expand the court's role. Indeed, this suggestion would place us in the business of superimposing quantitative parameters on the FCC's discretion. Our review power surely does not allow us to engage in a de novo quantitative analysis.

Victor Broadcasting, supra, 722 F.2d at 733. It had earlier summed up: "Simply, quantity may not always be better than quality." Id. (footnote omitted).

25. Based upon that mass of impeccable authority, one would have thought the notion of a quantitative approach to performance measurement had been interred far beyond recurrent rhubarb, and that the public, as well as licensees and challengers, could take all strata of government at their solemn word that quantity was not the benchmark of past licensee performance when it came time to calibrate a station's responsiveness to its community, the authentic assize for a "renewal expectancy." See, e.g., Simon Geller, supra, 90 FCC 2d at 1982 ("the licensee's responsiveness to the ascertained problems and needs of its community remains 'central'"); Commercial TV Stations, supra, 98 FCC Rd at 1091 (eliminating, inter alia, programming percentage guidelines and formal ascertainment, but repeating that "the only programming obligation of a licensee should be to provide programming responsive to the issues of concern to its community of licensee," leaving the amount and programming mix to the forces of

the marketplace)(emphasis added)). And, one would have thought that the exactions of Rainbow and the Mass Media Bureau to here apply a raw quantitative index to Fox's "renewal expectancy" were no more than the phoenix of regulatory irredentism. But, curiously, both can clutch a wraith of support.

26. Notwithstanding its very public and very frequent eschewal of a quantitative approach to "renewal expectancy," an approach the Mass Media Bureau's own masters have disdained as "simplistic" and "invalid," both the Bureau and Rainbow embrace tenaciously the footnote language of the 1989 notice of inquiry discussed supra, paras. 8-9, urge that we ignore the congregation of superior authorities cited supra, paras. 23-24, and fixate regardless on the "amount of nonentertainment programming." [42] The Board has long been aware, if not baffled, at an unfortunate buzz of policy cross-talk over whether the FCC does -- or does not -- weigh "renewal expectancy" on a scale leveraged over a quantitative fulcrum. So after reeling in the filament of comparative renewal precedent issued subsequent to the court's guidance in Central Florida, the Board deduced as follows:

> Although it is true that the Commission has initially consulted the quantitative breakdown of station program performance in every recent comparative renewal case, it is equally evident beyond argument from case and policy precedent that the statistical breakdown is merely one, prima facie indicator of station performance; a

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[42] See Rainbow Exceptions at 16 & n.5; Bureau Reply at 15, 17 (citing 1989 Formulation of Policies and Rules, supra, 4 FCC Rcd at 6368 n.11). But compare id., at 6364 (footnotes omitted; emphasis added):

> A second option considered involved quantified programming standards. We previously explored the possibility of adopting quantified programming standards for the renewal of television station licenses. After an inquiry, we found that quantitative standards would artificially elevate the level of non-entertainment programming, and would thereby restrict the licensee's programming discretion in contravention of the public interest. We found further that imposing quantitative guidelines for non-entertainment programming would not necessarily increase the quality of service provided. None of the commenters refuted these concerns, or suggested a basis for selecting a standard that could adequately address the multitudinous situations in which the Commission's almost 15,000 authorized broadcast stations exist.

quick starting point, but no more than that.

Intercontinental Radio, supra, 98 FCC 2d at 630; see also, e.g., Metroplex, supra, 4 FCC Rcd at 8152; Pillar of Fire, supra, 99 FCC 2d at 1261. Hence, we shrink from Rainbow's siren song, and the Bureau's descant, to finally rank KTTV-TV almost exclusively on the percentile of its nonentertainment programming. Rather, we shall heed the National Black Media Coalition court and set our larger appraisal of the station's responsiveness on the "other factors," 589 F.2d at 581, that the authorities unanimously regard as far more vital in this exercise.

27. In so doing, we are involuntarily struck by a galactic abyss in the pleadings of Fox's two detractors: reiterating the axiom that a renewal applicant is to be measured by its showing of responsiveness to community issues, neither Rainbow nor the Bureau alleges, nor even hints in their criticasting of the I.D., that a single, pressing issue manifested in the KTTV-TV service area was not addressed in the ALJ's litany of station programming keyed to ascertained issues. Nor do they intimate that any significant subgroup -- whether defined by race, ethnicity, gender or geography -- was purposely, even negligently, slighted during the abbreviated license period. Compare, e.g., Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)(minority population ignored). Another panel elaborated:

> How a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion. It may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing public.

Stone v. FCC, supra note 14, 466 F.2d at 328 (D.C. Cir. 1972)(emphasis added). Yet precisely like the complainants in Stone, neither our challenger nor the Bureau link their grievances "to specific programming deficiencies" vis-a-vis the Los Angeles community's needs, problems or issues. See id. Instead, they would arrogate to themselves the licensee's birthright discretion with the conclusory cant that Fox's "renewal expectancy" be "negated" or "diminished." While we are hesitant, in the face of Central Florida's apt depiction of a linguistic potpourri,[43] to affix an adjective to Fox's level of responsiveness, when we compare the record amassed here with the bedrock regulatory standard embodied in Criterion 2 ("Programming Responsive To Ascertained Needs"), we too would grade Fox's performance as superlative. From the inception of the licensee's ownership to the term end, no Stone was, or could be, hurled at the station's issue-responsiveness. As to any quantitative reduction, and putting aside the official drumbeat of fervid disclaimers of a quantitative index, the Board obviously appreciates that, at some descending point on the spectrum, the

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[43] See 683 F.2d at 508 n.27.

quality of licensee responsiveness and quantity must converge; and it need not be the absolute vanishing point epitomized in Monroe Communications and Simon Geller. We are likewise aware that the latter part of a license term is considered most probative of future performance. Monroe. Still, indiscriminate quantity is not the apotheosis that Rainbow and the Bureau, but no other authority, would make of it. Nor did the ALJ, when he considered their arguments anent the latter part of the term and concluded that:

> here, unlike [Monroe Communications], there was no decline in KTTV's overall commitment to responsive programming and community service. As demonstrated by the record, throughout the license period KTTV ascertained the needs of its community, responded with a variety of programming that met those needs, reached out to the community to assist in charitable and civic activities, and enjoyed the wide support of the public. Because KTTV's overall responsiveness was consistently meritorious, the cancellation of programs or the alteration of its program schedule, which lies wholly within the licensee's discretion, is irrelevant. Neither Commission precedent nor policy supports the elimination or diminution of KTTV's strong renewal expectancy preference.

I.D. at para. 202. Since the exceptions before us do not evulgate a probative diminution in Fox's commitment to respond to ascertained community needs and issues, a commitment evinced evenly and earnestly throughout the pertinent period, we have no legal or factual grounds whatever to upset the I.D. on this major score.

28. Before we too hastily depart this theater of operations, however, we must duly consider Rainbow's charge that Rupert Murdoch and (former) Fox Television Chairman Barry Diller "micromanaged" KTTV-TV operations; and that according to the station's (former) general manager, Robert Morse, both were significantly involved in programming, about which involvement Fox lied when it responded that these officials "'are far removed' from KTTV's day-to-day operations." [44] Fox responds by asserting that Morse's dissatisfaction with news scheduling decisions "must be appraised in light of his admitted lack of prior experience in independent television and his opposition to Fox's counterprogramming strategy"; that any Diller involvement was naturally and properly tied to his role as Chairman of Fox and related to "matters of programming philosophy"; and that Morse's suggestion of Murdoch's involvement "was based on a single hearsay statement [because] Morse never had any personal

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[44] Rainbow Exceptions at 17 & n.39. Indeed, based upon this alleged "conflict," Rainbow unsuccessfully sought a misrepresentation issue from the ALJ. Rainbow also excepts to the ALJ's denial of its request to depose Murdoch and Diller. See id.

contact with Mr. Murdoch."[45]

29. We find this tempest, as we understand it, to be utterly immaterial to the issue of whether Fox's programming responded to community needs. Even if we believed that Murdoch, baron of a worldwide media empire, kept a gimlet eyeball on his southern California sparrow, or that (former) Fox Chairman Diller ordained certain programming changes, we are nonplussed. The FCC expects a licensee's most senior officials to keep a rein on the station, at peril of license loss for inattention. See, e.g., Trustees of The University of Pennsylvania, 69 FCC 2d 1394 (1978)(renewal denied because of lax oversight by top licensee officials). But for the fact that Rainbow assigns error to the ALJ for failing to pursue this matter further, even to the point of a misrepresentation issue, all could rightly demur, for the statute is clear that an evidentiary hearing over a dispute is necessary only when a "significant and material" question is raised. 47 U.S.C. § 309(d)(2); Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392 (D.C. Cir. 1985). A substantial question is one that is fairly debatable or one that could very well be decided in favor of the petitioner. See United States v. Messerlian, 793 F.2d 94, 96 (3rd Cir. 1986); a material question is one that has legal significance or that affects the outcome of the litigation. See Lipsett v. Univeristy of Puerto Rico, 637 F. Supp. 789, 799 (D.P.R. 1986). Given the fact "that Congress intended to vest in the FCC a large discretion to avoid time consuming hearings in this [licensing] field whenever possible," Southwestern Operating Company v. FCC, 351 F.2d 834, 835 (D.C. Cir. 1965); see generally also Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 324 (D.C. Cir. 1974), and in light of the fact that we see little public interest profit in litigating a colloquy over how often top Fox officials might have commented upon the "day-to-day" operation of KTTV-TV, ultimately a vacuous definitional debate, we cannot fault the ALJ for not interrupting this long and complex proceeding to referee this peripheral squabble. The material before the ALJ and now before us does not suggest "that a further hearing would produce additional facts that might change the result." Capitol Broadcasting Co. v. FCC, 324 F.2d 402, 405 (D.C. Cir. 1963). Under Criterion 2, it is the hard record of responsive programming that is central, [46]

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[45] Fox Reply at 8 n.9 (citing Tr. 1325-1340).

[46] In that regard, though Rainbow excepts to the ALJ's refusal to allow it to depose Murdoch and Diller, the Mass Media Bureau retorts:

> Rainbow excepts to the Presiding Judge's denial of its request to depose Fox officials. Rainbow's exceptions should be denied. In its November 15, 1990, Notice of Depositions, Rainbow noticed seven Fox principals and employees for deposition. In describing the matters on which the deponents were to be questioned, Rainbow identified areas which had been the subjects of a petition to enlarge which was denied by Memorandum Opinion and Order, FCC 90M-3815, released December 4, 1990.

not which licensee official played what hand in overall programming policy. [47]

30. Reputation in the Community. Our Metroplex opinion echoed:

> In its landmark license renewal decision in Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966) (emphasis added), the court pointedly reminded the Commission of "our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life." Ever since Judge (Justice) Burger's instruction, both the court and the Commission have considered the station's reputation in its community, for good as well as for bad, see, e.g., Central Florida, 683 F.2d at 508; Victor Broadcasting, 722 F.2d at 762; Intercontinental Radio, 98 FCC 2d at 632-633.

4 FCC Rcd at 8152-53. Judge Burger's view, augmented by judicial reaffirmation, that the response of the local listening or viewing public is the "most

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> Rainbow did not notice them generally for discovery on Fox's renewal expectancy. The Presiding Judge properly rejected the taking of the depositions based on the fact that requested issues had been denied and that the allegations contained in Rainbow's motion to enlarge did not satisfy Rainbow's burden of coming forward with prima facie evidence of a violation of the Act or FCC Rules or policies. Cf. Metroplex Communications, Inc., 4 FCC Rcd 8149, 8163 n.11 (Rev. Bd. 1989), aff'd 5 FCC 5610 (1990).

Bureau Reply at 19-20 (emphasis added). This point seems well-taken.

[47] For instance, Rainbow cavils that (former) Fox Chairman Diller "micromanaged" KTTV-TV, as evidenced by Morse's testimony that Diller instructed that a papal visit to Los Angeles not be covered, Rainbow Exceptions at 17, thus undercutting Fox's claim that Diller was "far removed" from "day-to-day" operations of KTTV-TV. But Fox holds the licenses for five major market TV stations, and its parent controls at least one other, I.D., paras. 11-12, not to mention a burgeoning network and a major film studio. In addition to Fox, Murdoch also directs a chain of domestic and foreign newspapers, plus a large European satellite television network. From that data alone, no outright "misrepresentation" seems terribly likely.

reliable" test of performance is predicated on one immutable fact: whereas the FCC, a diminutive civil instrumentality with, inter alia, more than 15,000 broadcast stations to superintend, [48] has not an inkling of what any particular station is doing unless awakened by alarum, the local populace is there -- night-and-day-out -- monitoring the licensee's propagation.

31. Commencing at para. 87 of the I.D., the ALJ sketches a sampling of the local reaction to Fox's presence in the community. He first relays that the licensee maintained the "thousands of viewer letters received each year" in its public file. Unsolicited encomia reflect the community's appreciation for KTTV-TV's public affairs, news and public service programming and community involvement." Id. [49] Moreover, "[t]hirty public witnesses submitted affidavits on behalf of KTTV," ten of whom were cross-examined at Rainbow's beckon, id., para. 88, and their tributes are summarized in thirty separate sub-paragraphs of the I.D. In brief, but to impart the flavor of the evidence, the I.D. reflects the attestations of the president of the Hollywood Arts Council, the general manager of the Los Angeles Social Service Department as well as high officials of its Recreation and Parks Department, its Unified School District, and its Department of Children's Services. Representatives of a variety of other important community organizations are also present in goodly number.

32. Equally telling of KTTV-TV's reputation in the community is the multitude of honors and awards received by the station over the 1986-1988 interval. Paragraphs 102-113 of the I.D. describe the scores of local honors won by the station for its news and public affairs programming, including a host of local Emmy awards and nominations, Golden Mike Awards, Greater Los Angeles Press Club Journalism Awards, Angel Awards and many other prestigious accolades for outstanding service. (We here exclude awards for sports programming and the like, see supra note 26.) A quiet review of this profusion of awards and honors will affirm, far better than any rhetoric, the reputation for excellence achieved by Fox's Los Angeles facility in its short stewardship.

33. Rainbow, however, denigrates these achievements and asks the Board to consider what it regards as errors in this aspect of the I.D. It first contends that "most of the ten (10) Fox witnesses whom the ALJ permitted Rainbow to cross-examine (Tr. 1307) testified that they submitted affidavits without knowing that KTTV's license was under challenge...." And that "even the ALJ was compelled to observe that Fox's 30 public witness affidavits contain no opinion or reputational testimony." [50] Second, Rainbow maintains that it is "preposterous" for the I.D. to state that KTTV-TV's reputation in the community

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[48] See supra note 42 (FCC superintends "almost 15,000 authorized broadcast stations"). The FCC has approximately 1,850 employees, of which about 350 are assigned to the Mass Media Bureau (including clerical and administrative). That Bureau also administers a plethora of other media technologies, e.g., the sprawling cable industry.

[49] The ALJ synopsized a sample of 57 such unsolicited letters in para. 89 of the I.D.

[50] See Rainbow Exceptions at 20 & n.53 (original emphasis).

was "unblemished by any criticism," when Rainbow was precluded from introducing its own witnesses and exhibits to demonstrate widespread community dissatisfaction over the cancellation of the contract of a popular newscaster, Tony Cox. [51]

34. Fox, buttressed by the Bureau on this point, responds that "no evidence of any dissatisfaction with KTTV's responsive programming or other efforts on behalf of the Los Angeles community was introduced into the record of this proceeding"; that "Rainbow did not attempt to discredit Fox's public witnesses testimony, by extrinsic evidence or any other means"; and that the witnesses proposed by Rainbow "did not purport to testify regarding KTTV's programming performance or responsiveness to community needs," but rather would have testified at their disappointment at the cancellation of the newscaster's contract. [52]

35. Discussion. We are unpersuaded by Rainbow's unique assertion that the licensee's witnesses, and their affidavits, should be totally ignored, because many did not know the license was under challenge and their statements did not presume expertise on KTTV-TV's general reputation. Rainbow, which cross-examined many of the witnesses, does not claim a recantation or intimate that any affidavit contained falsehoods or exaggerations. Nor does the case law suggest that public witnesses must claim to speak for others, or even for themselves as to the station's general reputation in the community. Their own views and experiences are helpful. Compare, e.g., Victor Broadcasting, 722 F.2d at 762 ("numerous affidavits ... uniformly attested to [station's] high quality of service to the community, commending it for its locally originated programming and its cooperation with local service organizations")(quoting Commission decision) with I.D., para. 88 (ALJ portrayal of instant affidavits). The evidence here is sufficient to glean a useful insight into Fox's standing with the community and its active organizations.

36. While we ourselves might not have taken so restrictive a view of reputational evidence as to limit the testimony to only the responsive programming criterion, any error here was harmless. Fox and the Bureau contend that Rainbow's subject proffer dealt solely with discontent over the loss of a newscaster. We will assume, as Rainbow portends, that the evidence here would have castigated Fox for not retaining this popular air personality. But unless it is alleged that a licensee acted out of improper motive within the purview of the FCC (e.g., illicit discrimination, about which more infra paras. 59-62), something not even Rainbow argues in this particular instance, we too fail to see any great relevance in Rainbow's proffer. Air personalities evaporate with the rapidity of bubbles on the breast of Niagara, and the fact that Rainbow devotes the lion's share of its own "reputation" case to this singular incident stands, we think, as mute testimony to a dearth of potent ammunition to fire at Fox under this criterion. We must concur with the ALJ insofar as he found that the evidence here showed admirable repute, not only with a sample of community laity, officials and organizers, but with Fox's peers, who visited upon KTTV-

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[51] See id., at 19 & nn. 51-52.

[52] Fox Reply at 11 & n.16. See also Bureau Reply at 18 (same).

TV awards and honors by the dozens for the quality of its wares. This, too, serves KTTV-TV in good stead.

37. Compliance with Communications Act and FCC Rules. A licensee's record of conformance, vel non, with FCC rules and policies can have a deep impact on a licensee's "renewal expectancy," see, e.g., Central Florida, supra, 683 F.2d at 509 ("licensee misconduct ... may provide a more meaningful basis for preferring an interested challenger over a proven incumbent") (quoting FCC decision). Depending on the severity, regulatory misconduct can diminish a "renewal expectancy," see id.; see also, e.g., Valley Broadcasting, supra, 4 FCC Rcd at 2619 (numerous "reporting violations and other errors ... found to detract somewhat from the renewal expectancy"); United Broadcasting Co., Inc., 57 RR 2d 887, 897 (1985) (renewal expectancy slightly diminished for misconduct at other stations), [53] or the misconduct can be terminal. See, e.g., KOED, Inc., supra (misrepresentation disqualifies incumbent); Tri-State Broadcasting, supra (same); George E. Cameron, Jr., Communications (numerous violations plus lack of candor disqualify renewal applicant; challenger prevails).

38. Rainbow charges that the ALJ treated lightly or flatly ignored a series of delicts by Fox, which we count as follows: (1) a violation of Section 1.65 of our rules, 47 CFR § 1.65, for Fox's failure to report the cross-interest of Greg Nathanson, who served as vice-president and general manager of KTTV-TV, and later as president of Fox Television stations, while maintaining his position with Falcon Cable Company, as well as misrepresentations associated therewith [54]; (2) violations of the Commission's public file rules, and

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[53] The Central Florida court chastened:

> We note that there is some confusion between the Commission's pleadings and the Commission's decision as to whether the [rule] violation was weighed against the renewal expectancy to begin with.... An analysis of this hypertechnical issue would be relevant only were we to concede that it matters when the various factors are weighed, but this sort of timing should not, must not be critical.... The merit or lack of merit in the incumbent's record ... and all other factors are to be weighed, at all once, with an eye toward the public interest. Nothing is removed from the scales until the balance is struck....

683 F.2d at 506 n.16. See also Victor Broadcasting, 722 F.2d at 761 ("so long as the final comparative evaluation is complete, we do not require that the Commission consider the factors in any predetermined order").

[54] Rainbow Exceptions at 22-23. The exceptions assert error for the ALJ's refusal to add appropriate issues pursuant to a September 26, 1990 Motion to Enlarge.

misrepresentations associated therewith [55]; and (3) violations of the Commission's E.E.O. rules, and misrepresentations associated therewith. [56] Fox and the Bureau side with the ALJ on all of these matters, scarcely devoting much attention in their respective replies. [57] We find merit in several of Rainbow's arguments and error by the ALJ.

39. Cross-Interest - Section 1.65. Rainbow asserts that issues should have been be added by the ALJ to explore Fox's alleged "violation" of the Commission's "cross-interest policies" as well as Fox's failure to report the cross-interests giving rise to the perceived breach. [58] In a motion to enlarge issues filed before the ALJ on September 26, 1990, Rainbow asserted, citing Chicago Broadcasting, Inc., 5 FCC Rcd 851 (Audio Services Div. 1990), that its motion raised prima facie questions concerning alleged violations by Fox of both the Commission's cross-interest policy and its broadcast-cable cross-ownership rule, Section 76.501(a), [59] stemming from a Fox employee's interests in a local cable system(s) owner. [60] Specifically, Greg Nathanson, KTTV-TV's general manager and vice-president from October 18, 1988 until August 3, 1990, contemporaneously served as a director of Falcon Holding Group, Inc. (owner of cable systems operating within KTTV-TV's grade B contour), was a 20% voting

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[55] Rainbow Exceptions at 23-24 & n.67.

[56] Id., at 21 n.59; 23 & nn.65, 67.

[57] See Bureau Reply at 20-21; Fox Reply at 22-23.

[58] Among the issues Rainbow requested were:

> 2. To determine whether Fox is in violation of the Commission's cross-interest policies with respect to KTTV.
>
> 3. To determine whether Fox repeatedly violated the Commission's reporting rules by failing to disclose matters of potential decisional significance and by failing to update information provided in its 1988 renewal application for KTTV.

Rainbow Motion to Enlarge Issues, filed Sept. 26, 1990, at 1.

[59] 47 CFR 76.501(a)(codified at 47 U.S.C. § 533(a)). The rule was amended effective Aug. 31, 1992, so that the provisions formerly at § 76.501(a)(2) now appear at § 76.501(a). Report and Order in MM Docket No. 82-434, 7 FCC Rcd 6156 (1992), recon. denied, FCC 93-80, released Feb. 23, 1993.

[60] Rainbow Motion at 9-11. Attached to Rainbow's motion were excerpts from Falcon Cable System Company's 1988 and 1989 Annual Reports and an August 4, 1990 Los Angeles Times article describing Nathanson's positions at Fox and KTTV. Id., at Appendices E-F.

stockholder of Falcon, and sat on the company's Advisory Committee. [61] On August 3, 1990, Fox "appointed" Nathanson president of Fox Television Stations Inc., shortly after which point he ceased managing KTTV-TV. [62] On September 25, 1990 (the eve of the deadline for filing motions to enlarge), Nathanson resigned his Falcon directorship and Advisory Committee membership. [63] Nathanson continued to serve as president until Fox elected a new president on May 18, 1992. [64] Nathanson has since resigned from Fox. [65]

40. Citing Reexamination of the Commission's Cross-Interest Policy (Notice of Inquiry), 4 FCC Rcd 2208, 2214 (1989), Rainbow contends that Fox violated those provisions of the policy which prohibit a "key employee" or an officer of a broadcast station from serving as a director or owning a substantial nonattributable equity interest in another local media outlet. Moreover, continues Rainbow, Nathanson's positions at the television station and his interest in a local cable system(s) owner were attributable by operation of the Commission's multiple ownership rules, thus resulting in a violation of the broadcast-cable cross-ownership prohibition. [66] Finally, Rainbow submits that

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[61] Id., at 10; see also Fox Opposition, filed Oct. 26, 1990, at 15-19.

[62] Fox stated: "On August 3, 1990, Mr. Nathanson was given the title of President, Fox Television Stations and he is no longer Vice President/General Manager." Fox Opposition at 15. See also Fox Opposition to Motion to Reopen, filed July 7, 1992, Attachments A-B (Nathanson relinquished the title of vice-president/general manager on Aug. 3, 1990; Mitchell Stern served as vice-president/station manager from Sept. 8, 1989 until May 18, 1992).

[63] Fox Opposition at 19.

[64] Fox Amendment, filed June 2, 1992.

[65] See Rainbow Motion to Reopen at 10, Exhibit C.

[66] Rainbow Motion at 9-10. The broadcast-cable cross-ownership rule, § 76.501(a) provides:

> No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

See generally Second Report and Order in Docket 18397, 23 FCC 2d 816 (1970), recon. denied, 39 FCC 2d 377 (1973). The rule was codified by the Cable Communications Policy Act of 1984 and provides:

Nathanson's dual relationships had "potential decisional significance" with respect to the KTTV-TV renewal application and, pursuant to Section 1.65, Fox was required to divulge them to the Commission. [67] Before the ALJ, the Mass Media Bureau had supported the addition of the requested issues, "absent a satisfactory explanation from Fox." [68]

41. In its opposition to that Rainbow motion, Fox stated that Nathanson's interests in Fox and Falcon were neither attributable under the cross-ownership rules nor contrary to the cross-interest policy and, accordingly, were not required to be reported under Section 1.65. Fox asserted that: (1) Nathanson "is only an employee" with no attributable or cognizable interest in Fox as an owner, director, or, "notwithstanding his title," as an officer [69]; (2) Nathanson's Falcon directorship is neither attributable under the multiple ownership rules [70] nor meaningful under the cross-interest policy because he did not participate in any meetings of the Board (none were held) and he was not

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> It shall be unlawful for any person to be a cable operator if such person, directly or though 1 or more affiliates, owns or controls, the license of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

47 U.S.C. § 533(a).

[67] Rainbow Motion at 12.

[68] Bureau Consolidated Comments, filed Oct. 26, 1990, at 9.

[69] Fox Opposition at 15, 26. Fox maintains that Nathanson was not an "elected" officer of Fox, despite his title of president of Fox Television Stations. It claims (without dispute) that Nathanson was never "elected" to be an officer; that he had no authority to bind Fox as an officer; and that he was simply "given" the title of president. Id., at 15-16.

[70] Id., at 21-22 & n.4. Citing Section 73.3555, Note 2(h), Fox argued that Rainbow's attribution of the Falcon cable interests to Nathanson by virtue of his directorship overlooks the rule's distinction between directors of parent entities as opposed to those of operating entities. However, Note 2(h) provides only that attribution may be "waived" for directors of a parent company, where their duties are "wholly unrelated" to the cable television systems providing that a "statement properly documenting this fact is submitted to the Commission." Where, as here, such documentation is not submitted, "directors of a . . . cable television system . . . are considered to have a cognizable interest in the entity with which they are associated." See also § 76.501, Note 2(h); compare MMM Holdings, Inc., 4 FCC Rcd 8243, 8248, 8251 n.29 (1989)(although parties contended that an outside director's cross-interests were not attributable, his interests were reported to the Commission with the broadcast licensee's ownership report).

involved in the management or operation of the Los Angeles area cable systems [71]; (3) Nathanson had no attributable ownership interest in the cable systems, because Falcon is owned and controlled by a single majority stockholder, and Falcon does not itself own any cable systems [72]; (4) that Nathanson's ownership interests in the individual cable system(s) owners are very minor [73]; and, (5) there is no actual or potential threat of a substantial diminution in competition on account of the dual relationship. [74]

42. The record here reflects that, in response to a request by Fox, Nathanson provided Fox, on May 17, 1989, written notice of his status with Falcon, together with a brief description of Falcon's control of limited partnerships owning cable systems serving areas within KTTV-TV's Grade B contour. Nathanson disclosed his 20% ownership interest in Falcon itself; his interests not exceeding 9.2% in the cable system(s) owners; and his position on Falcon's Board. The letter further contained Nathanson's assurances that he would not participate in the management or operations of Falcon's Los Angeles area cable systems while he was general manager of KTTV-TV. [75] In an affidavit

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[71] Fox Opposition at 19-23. According to Fox, Nathanson's only act as a Falcon director was to sign unanimous consent resolutions prepared by others.

[72] Falcon is the managing general partner of limited partnerships owning and operating numerous cable systems. Id., at 16.

[73] Id., Exhibit 7, Attachment A. According to Fox, Nathanson's interests in Falcon subsidiaries operating cable systems serving the KTTV-TV Grade B contour were: Falcon Cablevision, in which Nathanson has a 6.8898% interest, owns cable systems operating in the Big Bear Lake, Lake Arrowhead, and the Malibu areas; Falcon Cable Systems Company, in which Nathanson owns a 0.1841% direct limited partnership interest and a 9.1994% indirect interest, owns a cable system in the Hesperia area; and, Falcon Cable Media, in which Nathanson holds a .3% indirect interest, owned until Oct. 1989, a system serving Azuza. Id., at 16-18 & nn.25, 29.

[74] Fox points out that KTTV-TV is one of 22 broadcast television stations in the market, while Falcon's Los Angeles area cable systems each carry at least 9 broadcast channels (including KTTV-TV) and serve 60,000 subscribers, amounting to .1.2% of the total homes and 2.4% of the cable homes in the Los Angeles ADI. Id., at 17-18, 23-25; see also Rainbow Reply at 13-14.

[75] Fox Opposition, Exhibit 5, Attachment 7. In his "privileged and confidential" letter to Robert Kreek, (then) president of Fox Television Stations Inc., Nathanson explained why he was retaining his interests in Falcon:

> Since my Falcon holdings represent a substantial personal asset to me, and, furthermore, since there is an ongoing and frequent issue within Falcon relating to the periodic dividends of the Company, I wish to remain as a director of Falcon in order to ensure that my financial interests

attached to Fox's opposition, Nathanson sought to assure the Commission, as he had assured Fox in 1989, that he had no "material involvement" in the operation of the Los Angeles area cable systems; that he made no managerial decisions at KTTV-TV to benefit Falcon, acknowledging that "[a]ny such action would be a violation of my duties to Fox"; and that he would continue to act in such manner "as long as he is employed by Fox in a significant position." [76]

43. The ALJ declined to add the requested issues. [77] Although the cross-interest policy "essentially prevents individuals from having 'meaningful' cross-interests in . . . a television station and a cable television system serving substantially the same area," [78] the ALJ concluded that the policy did not apply to Fox because Nathanson had resigned from the Falcon Board. He further ruled that no substantial question was raised as to whether Fox had previously violated the policy's aims, because Rainbow had failed to show: (1) any "meaningful" involvement by Nathanson in the management and operation of Falcon's Los Angeles area cable systems; or (2) that the cable systems and KTTV-

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> in the company are not adversely affected without my knowledge.

Nathanson's assurances that his continued involvement with Falcon would not conflict with his management of KTTV-TV provide (id.):

> I hereby give you my assurance that, so long as I am employed as General Manager of KTTV, I will not attempt either directly or indirectly to participate in, or to influence the operations and management of, any Falcon systems which lie within the Grade B contour of KTTV. This commitment includes, but is not limited to, my refraining from giving advice to Falcon or any of its cable systems regarding programming, channel assignments, service offerings, advertising or advertising sales practices, pricing or marketing, and recusing myself from any board of directors discussions or actions involving the management or operations of those systems.

[76] Id., Exhibit 5, at 3-4.

[77] Memorandum Opinion and Order (MO&O), FCC 90M-3815, released Dec. 4, 1990.

[78] Id., at 2, quoting Reexamination of the Commission's Cross-Interest Policy (Notice of Inquiry), 2 FCC Rcd 3699 (1987).

TV serve "substantially the same area." [79] Finding that Rainbow had failed to rebut Fox's claims that Nathanson was not an "officer," and thus not a Fox principal, the ALJ did not consider Rainbow's assertion that Fox violated the broadcast-cable cross-ownership rule; and he further found that no reporting issue was warranted because Nathanson's cable interests were, thus, not of "potential decisional significance." [80]

44. In its exceptions to the I.D., Rainbow maintains that the ALJ's denial of its 1990 motion to enlarge was an abuse of discretion and that Nathanson's roles as KTTV-TV's general manager and Falcon's director, as well as Fox's failure to disclose these facts to the Commission, compel further evidentiary hearing on cross-interest and reporting issues. [81] In its reply,

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[79] The ALJ also found the overlap area of the Falcon cable systems with KTTV-TV's Grade B contour to be de minimis. MO&O at 3.

[80] Id., at 4.

[81] Rainbow Exceptions at 22. Rainbow had originally sought enlargement of the issues to examine whether Fox violated the Commission's cross-interest policy and its cross-ownership rule, 47 CFR 76.501(a). The Bureau supported Rainbow's request for the addition of an issue on the "cross-interest policies." See Consolidated Comments, at 6, 9 (emphasis added). In its exceptions, Rainbow does not again invoke the cross-ownership rule, but contends that its motion "raised a cross-interest issue." Rainbow Exceptions at 22 (emphasis added). We believe that a strong argument can be made that, because Nathanson was concurrently a director of Falcon Holdings and president of Fox, a violation of the broadcast-cable cross-ownership prohibition, codified at 47 U.S.C. § 533(a), occurred. But, the confusion over whether a particular relationship implicates the cross-ownership rule or the cross-interest policy is nothing new. In United Community Enterprises, Inc., 37 FCC 2d 953 (Rev. Bd. 1972), the Board disagreed with the Bureau as to the same question, and said (id., at 955):

> In view of the fact that the Bureau, in its pleadings and during its presentation at the oral argument, failed to distinguish properly between the rule and the policy and failed to recognize the differences in the situations to which each is applied, it is pertinent that the evolution of both the rule and the policy be explored.

Because Rainbow does not refresh its cross-ownership charge, and because the general remedy for such infraction (cessation of the cross-interest) appears to be the same, see News International, PLC, 97 FCC 2d 349, 371 (1984) (parties given 1 year to divest overlapping cable systems); see also Mario J. Gabelli, FCC 92M-1067-68, released Dec. 4, 1992 (investors agree to come into compliance with §§ 73.3555 and 76.501 within 8 months; ALJ also grants waiver for overlapping broadcast interests in New York market), we pursue the matter no further. It is sufficient, we think, to state our view that Nathanson's relationship triggered the cross-interest policy.

Fox repeats its position that, because Nathanson was never an officer of Fox and that he had at no time participated in the management or operations of the Falcon cable systems serving Los Angeles, there was no cross-interest under the policy. [82] At oral argument, Fox counsel responded to our cross-interest policy questions by stating, "First I am going to confuse you on this section . . . .," Tr. of Oral Arg. 1633, and then did his level best to do just that. Fox repeated its defense that the policy was not implicated because Nathanson was unelected, while at the same time stipulating that he was a "key employee." Id., at 1634. [83] It was further stipulated (id., at 1641):

> There is no question that the company was aware of the cross-interest policy at that time. Once we knew that he had interests in the cable system, the company took every step, every responsible step, to ensure itself that it was in compliance.

Fox counsel next contended that Nathanson's role as a Falcon director, until September 25, 1990, constituted no "meaningful relationship" because "[t]he [Falcon] Board never met." Id., at 1642. And, in any event, the television/cable overlap "is less than 1.2 percent of the Los Angeles ADI." Id. [84]

45. Discussion. The Commission's cross-interest policy consists of "a loose collection of adjudicatory decisions" intended to prevent the attainment of media interests that are not directly controlled by the multiple and cross-ownership rules, but that would tend to actually or potentially impede economic competition and diversity of viewpoint. [85] The policy is applied by employment

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[82] Fox Reply at 22. The Bureau agreed with Fox on this point. Bureau Reply at 20.

[83] However, citing language in Media, Inc., 20 FCC 2d 937, 939 (1969), Fox had earlier argued that the cross-interest policy as applied to broadcast applicants is limited to whether the applicant's principals hold "meaningful relationships" with area media outlets, thus shielding "key employees" from the policy's purview. Fox Opposition at 13 n.11.

[84] At one point in the argument, Fox counsel contended that Nathanson had "no involvement in the management and operation of the station." Tr. of Oral Arg. 1646. We assume that counsel was referring to that period after Nathanson was "appointed" president of all Fox stations, and superseded in his KTTV-TV management role. See Fox Opposition, Exhibit 5; see also Fox Opposition to Motion to Reopen, Attachments A-B. However, to suggest Nathanson had "no" involvement in the management of the station is supercilious, particularly during the period when he was general manager and vice-president of KTTV-TV, so counsel's promise to create confusion was surely kept.

[85] Notice of Inquiry, 2 FCC Rcd at 3699; see also Reexamination of the Commission's Cross-Interest Policy (Policy Statement), 4 FCC Rcd 2208, 2209 (1989).

of a two-prong analysis: (1) whether there is a "meaningful relationship" between media outlets and (2) whether the media outlets serve "substantially the same area." [86] The policy expressly encompasses cross-interests involving a television broadcast station and a cable system operating in the same area. [87]

46. In 1987, the Commission issued a Notice of Inquiry proposing to reexamine, clarify, and possibly eliminate the cross-interest policy in light of its vague and sometimes unpredictable nature. The intervening changes in the attribution, multiple ownership and cross-ownership rules, and the growth and evolution of the video marketplace all conjoined to render obsolete many of the older taboos. [88] In its 1989 Policy Statement, the Commission narrowed the scope of the policy by deleting consulting positions, advertising agencies, and time brokerage arrangements from its purview. [89] It simultaneously released a Further Notice of Inquiry to determine how or whether to continue the policy with respect to "key employees," [90] nonattributable equity interests, and joint

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[86] See generally, Guy S. Erway, 90 FCC 2d 750, 752 (Rev. Bd. 1980); Lexington County Broadcasters, Inc., 42 FCC 2d 581 (Rev. Bd. 1973); K & M Broadcasters, Inc., 19 FCC 2d 947 (Rev. Bd. 1969). See also Cleveland Television v. FCC, 732 F.2d 962 (D.C. Cir. 1984), where the Commission itself argued that its cross-interest policy was not implicated by a dual relationship, but the court disagreed with the Commission. It may be salient that the court did find that a cross-interest issue had been raised, but ultimately agreed with the Commission that no "meaningful relationship" was present between the applicant and its non-voting stockholders holding the cross-interests. 732 F.2d at 970-71.

[87] See Policy Statement, 4 FCC Rcd at 2290; Notice of Inquiry, 2 FCC Rcd at 3699. See also News International PLC, 97 FCC 2d at 370 (attributable interests in 2 television stations and 50% nonvoting stock interest in cable television systems in same markets "does not comply with the purposes underlying the cross-ownership rules and cannot stand").

[88] See 2 FCC Rcd at 3700-02; see also Policy Statement, 4 FCC Rcd at 2211-13.

[89] 4 FCC Rcd at 2213-14. These roles were previously considered as potentially "meaningful relationships" under the cross-interest policy.

[90] A "key employee" is defined as: "a person in a position of authority to implement programming decisions, sales practices, or station operations, for instance, the general manager . . ." Notice of Inquiry, 2 FCC Rcd at 3699, citing, Martin Lake Broadcasting Company, 21 FCC 2d 180, 181-82 (1970)(cross-interest policy issue was added where AM applicant shareholders were general manager and sales manager at AM stations in same area). "Key employees" are considered "meaningful" under the cross-interest policy because:

> there is an apparent conflict of interest and a potential for impairment of competition because an individual has an attributable ownership interest in one

ventures. [91] That proceeding remains pending.

47. But despite a certain vagueness, our analysis of the facts before the ALJ yields a conclusion that Nathanson's dual interests clearly implicated the Commission's cross-interest policy. [92] Fox met the first prong of the cross-

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> station and is in a "key" position at a competing station to implement policy to protect his stake in the other station. Similarly, the holding of "key" programming positions could affect diversity of program or service viewpoints.

Notice of Inquiry, 2 FCC Rcd at 3699.

[91] Reexamination of the Commission's Cross-Interest Policy (Further Notice of Inquiry/Notice of Proposed Rule Making, 4 FCC Rcd 2035, 2035 (1989), where the Commission noted:

> [K]ey employee relationships may be different than the other types of cross-interests due to the role key employees play in a station's operations. Accordingly, because the potential for negative effects on competition and viewpoint diversity may be greater in key employee relationships than in other cross-interests, we believe it would be helpful to have further comment specifically focusing on key employee cross-interests. If we decide at the conclusion of this proceeding that key employee cross-interests should continue to be regulated, our preference would be to amend the attribution provisions of our multiple ownership rules rather than to continue proceeding on an ad hoc adjudicatory basis without benefit of guidelines.

[92] In its exceptions and at oral argument, Rainbow contends that Fox "violated" the cross-interest policy. However:

> A general statement of policy . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.

interest policy in that Nathanson had a "meaningful relationship" with Fox as a "key employee" while serving as KTTV-TV's general manager from October 10, 1988 until at least August 3, 1990. [93] During that period, Nathanson held an attributable interest in Falcon by virtue of his directorship. [94] The second prong of the policy, whether the two media outlets serve "substantially the same area," is trickier. Fox argues, and the ALJ agreed, that the 1.2 percent overlap of the Falcon cable systems with the KTTV-TV Grade B contour is too small to be considered "substantially the same area." However, we find this analysis inverted. With reference to the cross-ownership rule, of which the cross-interest policy is a corollary, the pertinent examination should not be to what degree the television service area is overlapped by the cable systems, but to what extent the Grade B contour overlaps the area served by the cable systems. [95] That information is not before us, but we note that, in the cross-

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Telecommunications Research and Action Center v. FCC, 800 F.2d 1181, 1186 (D.C. Cir. 1986) (quoting Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974)). Because a policy statement, even one not as admittedly vague as our cross-interest policy, does not create a "binding norm," it may be technically incorrect to speak of a "violation" as if discussing a statute or rule. As we have previously commented, supra note 81, it makes little difference, since the usual remedy (compulsory divestment or dissolution of a conflicting relationship) seems the same. The rule Fox did violate, in our reading, is § 1.65, although we concede that the admittedly vagarious nature of the cross-interest policy might be seen as mitigating that violation.

[93] See supra notes 90-91.

[94] See Section 73.3555, Note 2(h) and supra note 70. Furthermore, Fox's internal efforts to assure itself that there was no conflict between Nathanson's management of KTTV-TV and his maintenance of his interests in Falcon cable cannot be viewed as satisfying the licensee's obligation to report the underlying cross-interests to the Commission for its own public interest determination. See generally Cox Broadcasting Co., 78 FCC 2d 684, 703 (1980)(private letter agreements do not suffice to insulate principals with cross-interests from the multiple ownership rules).

[95] In its Second Report and Order, the Commission stated (23 FCC 2d at 821):

> Since what is at stake is diversity to the CATV subscribing portion of the public, the pertinent measure is the extent of the overlap within the service area of the CATV system. It makes no difference to the CATV subscribers that the service area of a commonly owned system constitutes only 5 or less percent of the station's Grade B contour, if 100 percent of the CATV service area is within the contour.

ownership context, the rule applies to apparently lesser overlaps. [96]

48. Although we have found that Nathanson's dual relationship implicated the cross-interest policy and that Fox had full knowledge of that policy, we must say that any transgression of the policy may have been somewhat mitigated by its imprecise nature. In fact, the Commission has expressly empathized with some licensees that have been subject to the policy. [97]

49. Having found that Nathanson's cross-interests implicated the cross-interest policy, Fox was duty-bound to report them pursuant to Section 1.65 of the Commission's rules. [98] Fox was keenly aware of the applicability of the

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See also Warner Amex Cable Communications, Inc., 75 FCC 2d 393, 397-98 (1979).

[96] See Second Report and Order, 23 FCC 2d at 821 ("if the CATV system is wholly or partially within the Grade B contour, cross-ownership should be barred."); cf. Cablevision VI, Inc., 5 FCC Rcd 7166 (1990)(no authority to waive cross-ownership rule where television station's actual Grade B contour did not overlap cable system but predicted contour overlapped system's 462 subscribers); Humboldt Bay Video Co., 40 RR 2d 644 (1977) (application for certificate of compliance denied where cable system served a population of 1112 within Grade B contours of television stations having ownership interests in the cable system).

[97] The Commission stated in its 1989 Policy Statement that (4 FCC Rcd at 2212; emphasis added):

> the ad hoc development of the policy has had the unintended effect of surrounding certain media transactions with a cloud of uncertainty. In the line of cases from which the policy has evolved the Commission has tried to determine whether particular relationships are "meaningful" and whether the media outlets at issue serve "substantially" the same area. Inconsistencies among these cases render difficult, if not impossible, a definitive determination by broadcasters, in advance of adjudication, as to whether an overlap in service areas is substantial enough or a relationship sufficiently meaningful to warrant regulatory intervention.

See also Notice of Inquiry, 2 FCC Rcd at 3700-01.

[98] See, e.g., CBS, Inc., 50 FCC 2d 712, (Rev. Bd. 1975)(§ 1.65 issue added where applicant failed to report that principal was director of newspaper published in community of license); Pacifica Foundation, 41 FCC 2d 71 (Rev. Bd. 1973)(§ 1.65 issue added where applicant failed to update application as to new officers and directors). See also Teleprompter Corp., 89 FCC 2d 417, 435-36

cross-interest policy to this proceeding, because the Hearing Designation Order in this very case required the divestiture of a potential cross-interest in the event Rainbow received a construction permit. [99] Hence, we conclude that the ALJ erred in failing to add both a cross-interest policy issue and a Section 1.65 issue at the time Rainbow filed its September 1990 motion. After a thorough exploration, a determination could have been made by the ALJ as to whether Nathanson's dual roles had a vexatious potential for anticompetitive effect, and whether divestment or dissolution was appropriate. [100] As it is now, Nathanson is not a Fox employee, so no productive purpose would be served by a remand. From the facts of record, this Board, at least, has no difficulty in holding that Fox had a cross-interest concern, was aware of the policy, and that Rainbow is correct that Fox's duty was to report this interest to the FCC rather than internally "self-regulating." Cf. Cox Broadcasting Co., 78 FCC 2d 684, 703 (1980). The remaining question is whether Fox 's actions regarding Nathanson suggest something more than a misunderstanding or a legitimate policy dispute.

50. Because we are resolved that the ALJ erred in not adding a cross-interest issue against Fox and that Fox did not comply with Section 1.65 by reporting Nathanson's cross-interest, we must address Rainbow's concomitant claim that Fox's conduct here amounted to (1) a lack of candor for "its past failure to report Nathanson's cross-interest," [101] compounded by (2) a misrepresentation of "Nathanson's roles, both as KTTV's General Manager and as President of the licensee itself." [102]

51. Given the fact that the Commission has admitted the vagueness of its cross-interest policies on the very two elements that here generate the issue (i.e., what constitutes a "substantial overlap" between potentially competing media interests and what constitutes a "meaningful relationship" between those interests, see supra note 97), and inasmuch as Rainbow provides not a scintilla of evidence to show that Fox did not believe honestly that Nathanson's dual roles, as voluntarily circumscribed, triggered the policy, it is difficult to

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(1982) (no § 1.65 issue added, although joint venture negotiation should have been reported: "If Section 1.65 is to be effective, applicants cannot construe its scope as covering only that which they believe is relevant").

[99] See 5 FCC Rcd at 5255-56 (construction permit conditioned on Rainbow's certification that its principal, currently a vice president of KCAL-TV, Norwalk, CA, had severed all connection with that facility).

[100] See supra note 81; see also Rust Craft Broadcasting Co., 63 FCC 2d 1136 (1978) (divestiture of conflicting television and cable interest ordered), recon. granted in part, 68 FCC 2d 1013 (1978) (applicant resolved cross-ownership violation by placing conflicting interest in trust); Cable Television of Puerto Rico, 29 RR 2d 1137, 1140 (1974) (evidentiary hearing on television-cable cross-interests avoided by party's agreement to divest cable interests).

[101] Rainbow Exceptions at 22.

[102] Id. (footnotes omitted).

find intentional deceit on the part of Fox, even though we find in retrospect that the policy was implicated and that Fox should have reported Nathanson's roles. While this Board considers Fox's cross-interest policy arguments sorely unconvincing, we must simultaneously confess that we must go some distance from our retrospective policy determination to evidence of an intent to conceal. Thus, in stark contrast to the incumbent in RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), we are not presented with the spectre of a licensee that, when confronted with factual allegations of concern to the FCC, responded with the "stonewall" of a general denial of the underlying factual allegations. See 670 F.2d at 228. As with the cross-interest allegations here, the RKO court observed:

> Whether or not RKO would have had an obligation to come forward with these facts under other circumstances, it could not have doubted their relevance once the filings and petitions of the intervenors put these questions before the Commission. We need not decide whether RKO's pleadings were affirmatively misleading - it is enough to find that they did not state the facts.

670 F.2d at 230 (emphasis added; footnote omitted). When confronted here with Rainbow's cross-interest allegations, and while interposing its affirmative legal defenses, Fox did respond forthwith in a voluminous filing that laid out the factual material to support its legal defense. Unlike RKO, Fox did not resort to what the court saw there as "procedural games" rather than a full factual accounting. Compare 670 F.2d at 229. (RKO submits no facts; only a negative pregnant).

52. Nor is this a situation akin to those in, for example, KQED, Inc. or Tri-State Broadcasting, where demonstrative evidence and witness testimony disclosed intentional concealment. From all this record shows, Fox could have believed either that it had no cross-interest problem or had obviated any such conflict by its internal arrangements; indeed, the ALJ found no problem and the Bureau also was persuaded by Fox's explanation. Cf. Cleveland Television Corp. v. FCC, supra (cross-interest policy satisfied by passivity of stockholder). Rainbow has supplied no evidence, either by affidavit of a person familiar with contrary facts or by other documentation, compare KQED, Inc.; Tri-State, to show that Fox intended to conceal Nathanson's relationship with Falcon. As taught by (then) Judge Scalia in Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392 (D.C. Cir. 1985), we treat with Rainbow's complaints of concealment of Nathanson's role, and misrepresentation with respect thereto, under the two-step mode of 47 U.S.C. § 309(d). We are in accord with Rainbow that Nathanson's dual role(s) with Fox and Falcon, for so long as they endured, did raise a substantial and material question of fact over the cross-interest policy that was not, in our view, dispelled by Fox's response. And we think that, prior to Nathanson's resignation from Fox, Rainbow had raised a cross-interest matter that should have received a more formal and direct determination. Nonetheless, Rainbow has not made out "on the basis of ... the pleadings filed ...," id., a substantial and material question of fact over Fox's truthfulness about those

dual roles. It has supplied no probative evidence; only its surmise.

53. Short of actual evidence of intentional concealment, Rainbow asks in its exceptions and in its recent motions to the Board [103] that we draw adverse inferences from the fact that "both Mr. Nathanson's successor and his predecessor were 'elected' to hold the corporate office of Fox's president," and that "a substantial question now exists whether Fox has intentionally misrepresented Nathanson's status with Fox solely to avoid the cross-interest implications of his interests in Falcon Cable Company." [104] Rainbow has likewise argued throughout that "Nathanson's tenure as the licensee's 'named' but not 'elected' president is 'conveniently' the only time in history that Fox has not had an elected president." [105] It speculates that, since Fox has never presented a "credible explanation" of why, unlike his predecessor or successor, Nathanson was not elected a corporate officer, Fox has enaged in a "cover-up." [106]

54. True enough, unless the Board is purblind, the volumes of material Fox has supplied on this particular controversy have never once explained why Nathanson was not officially "elected" president of Fox stations, or elected a corporate officer; it has studiously avoided an explanation. Conversely, whereas Fox has supplied sworn affidavits to support its version of Nathanson's role(s) while at Fox, [107] Rainbow has supplied nothing but newspaper articles and press releases that do not contradict Fox's evidence, [108] but from which secondary material it insists that Board must extract inferences of misrepresentation. Yet even as we read the material supplied by Rainbow, we are unable to join its leap of faith that, merely because Nathanson was described as "president" of Fox stations, as were his predecessor and successor, that Fox has lied when it avers that Nathanson was never "elected" as president or as a corporate officer. We contrast this with Tri-State Broadcasting, where

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[103] See Rainbow Motion to Reopen and Enlarge Issues, filed June 18, 1992, at 4 et. seq. See also Rainbow Second Motion to Reopen and Enlarge Issues, filed February 19, 1993.

[104] See id., at i.

[105] Rainbow Exceptions at 23 n.64.

[106] Id., at n.63.

[107] See, e.g., Fox Opposition to Motion to Reopen and to Enlarge the Issues, filed July 7, 1992 (affidavits of Greg Nathanson and Mitchell Stern).

[108] Although the Commission has occassionally appeared uneven on the question of whether it will respond to press accounts, compare, e.g., News International, PLC, 97 FCC 2d 349, 358 (1984); accord Kaye-Smith Enterprises, 98 FCC 2d 675, 686 (Rev. Bd. 1984), review denied, FCC 85-192, aff'd per jugment sub nom. Hoffart v. FCC, 787 F.2d 675 (D.C. Cir. 1986) with Letter to David E. Henderson, Outlet Communications, Inc., 5 FCC Rcd 2835 (M. Med. Bur. 1990)(inquiry into political ad rates spawned by trade journal article), the RKO General court agreed that press accounts are "hearsay" on which the Commission need not rely. 670 F.2d at 229 n.39.

regardless of that licensee's assertion that an individual previously deemed untrustworthy was a "mere salesman," credible witness testimony and documentary evidence was tendered to show that the subject individual was in reality the station manager and a de facto owner. In fact, in Citizens for Jazz, where the affidavits supplied by the licensee were contested factually by a petitioner's affidavit, and the petitioner also sought adverse inferences from other uncontested facts, the court found it "impossible to hold ... that a substantial question concerning misrepresentation was presented." 775 F.2d at 396.

55. It is not that the Board will not draw logical inferences from record facts. Far from it, for in the absence of any explanation from Fox as to why Nathanson appears to have been sui generis among Fox television station presidents, we cannot but presume that Fox was actively seeking to avoid a cross-interest problem, and attempted to deliberately structure Nathanson's role to that end. That, in itself, is no problem; that is the very purpose of the Commission's cross-ownership rules and its cross-interest policy. We have held that Fox did not handle this matter properly; but, again, Rainbow has supplied nothing that contradicts the sworn evidence supplied by Fox as to the nature of, or internal limitations on, Nathanson's corporate position.

56. Heedless of the lack of real evidence of concealment or misrepresentation on the record or in the pleadings, we nevertheless inquired at oral argument what might be Fox's motive, since the case law suggests that the dual Nathanson roles would have constituted no more than a de minimis cross-interest concern. Rainbow counsel responded that a cable system has the potential for favoring or disfavoring a particular television channel, as by good or bad channel positioning, and that such a potential was the Commission's raison d'etre for maintaining its cross-interest policies for "key" media employees. See Tr. of Oral Arg. 1682-1684. This comment caught the Board's attention, because the Commission is not unfamiliar with licensees who use one media facility to favor another in which it has a co-interest. See, e.g., WGAL Television, Inc., 62 FCC 2d 527 (1976)(licensee uses co-located newspaper to favor co-owned television station). But, despite the fact that there are twenty-two television stations serving Los Angeles, I.D., para. 16, and southern California broadcasters are not reticent to complain in the face of unfair treatment by a cable system, see, e.g., Sunbelt Television, Inc. v. Jones Intercable, Inc., CV-91-3506 WDK (C.D. Cal. __, 1992)(broadcaster awarded $3 million against cable system for anticompetive treatment of broadcaster), Rainbow has produced nothing to suggest Falcon favored Fox, or that any local broadcaster has so intimated. Rainbow itself does not allege that favortism was shown. See also supra note 75. On the record, Falcon Cable is snow pure. We do take Rainbow's point that it is the "potential" for anticompetive consequences that supports the prophylatic cross-interest policy, and understand its postulate that -- because of that "potential" -- Fox had motive to conceal and misrepresent Nathanson's role. But even if we accept Rainbow's thesis as to motive, the unavoidable fact remains that the record material, as supplied by both parties, does not put Fox's candor or truthfulness in issue. Rather, the record material squarely supports Fox on the facts as Fox represents them, and Rainbow's skepticism is no substitute for a specific allegations of fact to show a public interest question over Fox's truthfulness. We are constrained to agree with the ALJ that, based on the pleadings and all else we may appropriately notice, no substantial amd material question of fact is presented.

47 U.S.C. § 309(d)(2). That Fox could have avoided any suspicion of duplicity by placing the matter before the Commission as soon as Nathanson became KTTV-TV's general manager, and sought an official FCC dispensation, is beside the immediate point, but poetic justice anyway for the licensee's foxiness.

57. Rainbow asserts, however, that the cross-interest matter is part of a pattern of reporting failures, as evidenced by Fox's neglect to notify the FCC of the civil lawsuits, one involving "the private settlement of a $21 million fraud suit" in which Fox and KTTV-TV were charged with unlawfully scheduling Fox Film advertisements, [109] and a second (now dismissed) suit in which Disney charged "several Fox companies, including Fox Television Stations, Inc." with violations of the antitrust laws. [110] Citing the Character Policy Statement, 102 FCC 2d 1179, 1195-97, 1205 (1986), and supported by the Mass Media Bureau, the ALJ found Fox had no duty to report these "unadjudicated" lawsuits. Memorandum Opinion and Order, 90M-3815, released December 4, 1990 at 4-5.

58. Although this is another area not without regrettable ambiguity and much tergiversation by the Commission, we believe that the ALJ misjudged Fox's reporting requirements. It is accurate that the Character Policy Statement holds that, in its consideration of a licensee's basic qualifications, it will defer any FCC determination pending final adjudication by the forum having primary jurisdiction. Nonetheless, the reporting requirement appears broader. Fox's instant renewal application was filed on our November 1986 "postcard" form (303-S), which form advises renewal applicants as to "reportable actions":

> Reportable activities consist of judgments or decrees, including settlement, consent, and like agreements, where the misconduct occurred either in the operation of the station for which renewal is requested or in the conduct of the other broadcast and non-broadcast activities of the renewal applicant and parties to that application, such as all partners and all corporate officers, directors, and stockholders with a 10% or more ownership interest in the applicant.

Guideline 4 (emphasis added). Section 1.65, of course, requires updates on application information, and the Character Policy Statement stresses the "unique position...violations of anticompetitive and/or antitrust laws..." have historically had on a licensee's character. 102 FCC 2d at 1201-02. [111] We

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[109] Rainbow Exceptions at 22 n. 62.

[110] See Fox Opposition To Motion to Enlarge, filed October 26, 1990 at 35.

[111] That concern is unabated, see generally Schurz Communications Inc. v FCC, No. 91-2350 et al. (7th Cir. November 5, 1992).

believe Fox was required to report these civil suits to the FCC, [112] but cannot deny that keeping abreast of the latest FCC reporting requirement does take considerable effort. See Policy Regarding Character Qualifications, 5 FCC Rcd 3252, 3553 (1990) (modifying 1986 Policy Statement), modified on reconsideration, 6 FCC Rcd 3448 (1991) (requiring renewal applicants to report certain "non-FCC" litigation), stayed, Order, FCC 91-244, released August 1, 1991, modified, 7 FCC Rcd 6564 (1992) (eliminating requirement that applicants report pending litigation). See generally also supra, Thomas W. Lawhorne, supra note 112. It is our view that Rainbow has the better argument here, and that Fox, the Mass Media Bureau and the ALJ have the weaker.

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[112] We are reinforced in our belief that, at the pertinent time in this proceeding, Fox did yet have a duty to report these suits by Question 10, Section II ("Legal Qualifications") of FCC Form 301 (Aug. 1987 ed.), which form was revised shortly after the 1986 Character Policy Statement:

> 10. (a) Has an adverse filing been made or an adverse final action taken by any court or administrative body as to the applicant or any party to this application in a civil or criminal proceeding brought under the provisions of any law related to the following:
>
> > Any felony; broadcast related antitrust or unfair competition; criminal fraud or fraud before another governmental unit; or discrimination?
>
> (b) Is there now pending in any court or administrative body any proceeding involving any of the matters referred to in (a) above?
>
> If the answer to (a) and/or (b) above is Yes, attach an Exhibit giving full disclosure concerning persons and matter involved, including an identification of the court or administrative body and the proceeding by (dates and file numbers), a statement of the facts upon which the proceeding is or was based or the nature of the offense alleged or committed, and a description of the current status or disposition of the matter.

See aslo Thomas W. Lawhorne, 7 FCC Rcd 4341 (1992) (correcting Board's interpretation of Question 10 requirements).

59. Equal Employment Opportunity. In exceptions, Rainbow further contends that the ALJ erred in denying its request to add issues on employment discrimination by Fox. [113] Rainbow's request, which was included in its September 26, 1990 motion to enlarge issues, was premised on: (1) pending charges of discrimination against Fox; (2) statistical evidence of underrepresentation of Hispanics; and (3) evidence of current discriminatory practices at KTTV-TV. Its sole argument to the Board is that the ALJ's denial of the issue request erroneously focused only on pending discrimination cases. [114] Rainbow excepts also to the ALJ's disallowance of an appeal to the Commission of the Mass Media Bureau's "failure" to designate for hearing an EEO issue against Fox for its "'post-admonition' underemployment of Hispanics." [115] Fox, joined by the Bureau, supports the ALJ's rulings on these topics. [116]

60. In the 1990 motion to enlarge, Rainbow asserted that Fox discriminated against Hispanics and other minorities in its employment and promotion practices since becoming the licensee of KTTV-TV in 1986. [117] In addition to claims of present discrimination, and incorporating by reference the arguments presented in its request to certify, Rainbow asserts that KTTV-TV's Hispanic employment statistics for the period 1986-1988 provided evidence of past discrimination against Hispanics. [118] The Mass Media Bureau opposed the addition of an employment discrimination issue, discounting Rainbow's reliance on employment statistics as "purely speculative" and noting that the statistics had been reviewed and found satisfactory by Bureau staff prior to

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[113] Rainbow claims that Fox has admitted to "misrepresentations" made in its renewal application relating to the existence of a broadcast engineering school, the alleged exclusion of part-time employees from its employment reports, and the dissemination of its EEO policy to its employees. Rainbow Exceptions at 23 n. 65. Even taken as true, these allegations would be insufficient to warrant the addition of a hearing issue. Mistakes happen.

[114] Rainbow Exceptions at 23 n.66.

[115] Id., at 21 & n.59. Rainbow contends that the ALJ erred in concluding that: (1) the Commission's 1984 admonishment to (then) KTTV-TV-licensee Metromedia, Inc. to improve the representation of Hispanics did not apply prospectively to Fox; and (2) the Commission focuses on a station's overall efforts and not on individual minority groups. Id.

[116] Fox Reply at 21-23; Bureau Reply at 19.

[117] Rainbow Motion to Enlarge at 26.

[118] Id., at 28. Rainbow filed its Request to Certify an Application for Review to the Commission on Aug. 22, 1990, arguing that the Bureau failed to designate an EEO issue against Fox based upon these employment statistics and in light of the Commission's 1984 admonition to KTTV-TV's former licensee.

designation. [119]

61. In his Memorandum Opinion and Order, 90M-3198, released October 10, 1990, the ALJ denied Rainbow's certification request, based on his determination that no "controlling question of law" was demonstrated under Section 1.115(e)(3). He also considered Rainbow's statistics-based assertions of discrimination and stated (id., at 2 & n. 3):

> [T]he Commission staff reviewed KTTV's August 1, 1988, EEO program, filed as part of the station's license renewal application and the 1988, 1987 and 1986 Annual Employment Reports (Form 395-B). The staff concluded that KTTV(TV)'s EEO programs and efforts were in compliance with Commission requirements. As reflected in the letter to Congressman Richardson, attached to Fox's Opposition, the staff determined that although Hispanics are underrepresented based on the 50% parity guideline, the percentage of all minorities on the station's upper-four staff exceeds 50% of parity. Rainbow has failed to show that the staff's determination was erroneous.
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> * * *
>
> Rainbow has provided no basis for enlargement of the issues and this request will be denied.

Hence, he denied Rainbow's request for addition of an employment discrimination issue against Fox in Memorandum Opinion and Order, FCC 90M-3815, released December 4, 1990, expressly finding Rainbow's allegations of specific employment discrimination insufficient to warrant enlargement. [120]

62. Discussion. We will not further consider Rainbow's exception to the denial of its certification request, as that matter is not properly before the

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[119] Bureau's Consolidated Comments on Motions to Enlarge, filed Oct. 26, 1990, at 12. The Bureau also opposed Rainbow's certification request, concluding that it had failed to meet the standards of Section 1.115(e)(3) for consideration of applications for review of hearing designation orders by ALJs. The Bureau also contended that the pre-designation review by its staff had properly concluded that KTTV-TV was in compliance with the FCC's equal employment opportunities rule, 47 CFR § 73.2080. Bureau Opposition, filed Aug. 31, 1990; see also Fox Opposition, filed Aug. 31, 1990.

[120] MO&O, FCC 90M-3815, at 5-6.

Board. [121] Rainbow's remaining assertion of error before the Board is that the ALJ, in denying its request for an employment discrimination issue, failed to take into account the grounds presented other than current claims of discrimination. Apparently, [122] Rainbow's continuing complaint is grounded on its interpretation of statistics indicative of an underrepresentation of Hispanics. [123] It appears to us that the ALJ did give due consideration of this assertion, albeit in the earlier order which denied Rainbow's request to certify. [124] There the ALJ concluded that the Commission does not limit its statistical review of a licensee's equal employment performance to single minority groups, but focuses on the statistics of its overall minority employment. [125] We agree that Rainbow failed to demonstrate that an employment

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[121] 47 CFR 1.115(e)(3) provides (emphasis added):

> Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. . . .

[122] Rainbow's exceptions on this point are rather less "particular" than contemplated by our rules. See 47 CFR 1.277(a).

[123] Specifically, Hispanics, which comprise 24.4% of the Los Angeles workforce, were represented in KTTV-TV's upper four job categories at a rate of 9.4%, which is somewhat short of the FCC guidelines of 50% parity with the workforce. However, the Bureau noted that KTTV-TV's overall employment of minorities in the upper four jobs exceeded the 50% parity standard, and its overall employment of Hispanics in all job categories also exceeded the standard. Bureau Opposition at 3.

[124] See MO&O, FCC 90M-3198.

[125] See generally Bilingual Bicultural Coalition v. FCC, 595 F.2d 621, 625 n.7 (D.C. Cir. 1978); see also Storz Broadcasting Co., 88 FCC 2d 641, 642 (1981). Rainbow argues, but fails to demonstrate, that Hispanics are the dominant minority in Los Angeles and, thus, that they should serve as the basis of

discrimination issue was warranted against Fox, and Rainbow's exceptions on this point must be denied. [126]

63. Availability of Public File. Rainbow's exceptions further decry the ALJ's failure to add a "public file availability" issue against Fox "in light of substantial evidence that the public repeatedly was told by Fox representatives that there was no public file at KTTV." [127] Specifically, Rainbow finds error in the ALJ's reliance on the fact that all of the individuals described in the underlying motion to enlarge had succeeded in obtaining access to the public file. But, Rainbow contends that the ALJ "unlawfully ignored": (1) the fact that these individuals were not average citizens, who knew the FCC's rules and made "Herculean efforts" to gain access to the file; and (2) the sworn testimony of one individual who was discouraged from reviewing the file by a KTTV-TV employee who, she claims, informed her that the file contained nothing of interest with respect to Fox's renewal

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comparison. Rainbow Exceptions at 21 n.59. Rainbow states that Hispanics comprise 25% of the total labor force, but it does not show that they are the dominant minority under the FCC's EEO rubric. See Bilingual, 595 F.2d at 625 n.7, citing Mission Central Co., 56 FCC 2d 782, 784 (Mexican-Americans are dominate minority group where they comprise 84% of the composite minority population) and KRMD, Inc., 53 FCC 2d 1179, 1186-87 (1975)(Blacks are dominant minority group where they comprise 99% of the SMSA's composite minority population). The cases upon which Rainbow relies, Miami Broadcast Renewals, 5 FCC Rcd 4893 (1990) and Texas Renewal Applications, 4 FCC Rcd 6685 (1989), do also indicate that the Commission will consider employment of significant minority groups in evaluating licensees' performance. However, the Bureau staff did analyze KTTV-TV's employment of Hispanics and it determined that, although the employment of Hispanics in the upper four job categories was less than ideal, is was reasonable in view of the station's overall employment of Hispanics, its employment of minorities in the upper four categories, and its recruitment efforts. See Bureau Opposition to Request to Certify, at 3-4. The Bureau's analysis of case precedent appears sound, and our own determination here is grounded on that analysis.

[126] One final point bears clarification. Rainbow asserts that the admonition directed at KTTV-TV's predecessor licensee (Metromedia) in 1984, directing it to "make reasonable and good faith efforts to recruit qualified Hispanic applicants during the coming license term," applies with equal force to Fox. Rainbow Exceptions at 21 n.59; Rainbow Request to Certify, Exhibit 1. Rainbow is not incorrect. See Gulf Dunes Broadcasting, Inc., 7 FCC Rcd 1593 (1992)(EEO reporting requirements and short-term renewal imposed on former licensee applies also to its assignee); Woolfson Broadcasting Corp., 4 FCC Rcd 6160 (1989)(same). However, we note that an EEO admonition is not a "sanction" as contemplated under the Administrative Procedure Act, see 5 U.S.C. § 558, and the Commission's 1984 admonition to Metromedia does not, of course, suggest any suspicion of, or actual, delict by Fox.

[127] Rainbow Exceptions at 23 (emphasis original).

application. [128]

64. Rainbow had also sought the public file availability issue against Fox as part of its September 26, 1990 Motion to Enlarge, there stating: "The pattern of repeated attempts to block access by Fox to KTTV's public file implies a potentially willful or intentional effort by Fox to frustrate access to public information." [129] In support, Rainbow had described four incidents, spanning 1988-1990, where it claimed that access to the KTTV-TV public file was "frustrated" or "effectively denied" by security guards and station personnel. [130] Appended to Rainbow's motion were three affidavits relating difficulties experienced by the affiants in gaining physical access to the files. [131] In a fourth affidavit, a Los Angeles resident described a telephone conversation with a KTTV-TV employee in which she alleges that she was informed that the KTTV-TV public file did not contain a copy of the KTTV-TV renewal application, and was discouraged from coming to the station to examine the file. [132] In opposition, Fox described the size and configuration of the Fox Television Center lot, lot security procedures, and Fox's continuing efforts and procedures to ensure the public's right of "reasonable access" to the KTTV-TV public file. [133] Fox admits that visitors coming to review the public file without advance notice may have to wait ten minutes or longer before they can clear security and be escorted to the station building and to the programming department where the file is kept. [134] Fox also provided an affidavit from Socorro Swan, the KTTV-TV employee who spoke with Rainbow's fourth affiant, Val Cole. Swan related an entirely different version of their telephone conversation stating that Cole had asked questions about how to obtain a station license and about the issues designated against Rainbow's application. Swan told Cole that the station's public file did not include that information. Swan further recalled that Cole did not ask about KTTV-TV's renewal application but that the station's local public notice, of which Cole was aware, clearly announced that the application was available for public inspection at the

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[128] Id., at n.67.

[129] Rainbow Motion to Enlarge at 7.

[130] Id., at 5-8.

[131] The three affiants each describe their efforts to review the public file, beginning with their contacts with the guards at the security gate to the Fox Television Center lot where KTTV-TV is situated. In each case, the guards expressed ignorance as to the existence of the public file and the public's right of access. After contacting station staff by telephone, however, each affiant did eventually achieve access to the file. Id., Appendices A-C.

[132] Id., Appendix D.

[133] Fox Opposition to Motion to Enlarge at 5-6.

[134] Id., Exhibits 1, 3.

station during regular business hours. [135] The Bureau, too, opposed the issue request noting that Rainbow showed no instance of denial of access to the public file by Fox, nor did Rainbow indicate that any individual was harassed or intimidated while seeking access. [136]

65. The ALJ denied the public file issue request, concluding that:

> Rainbow's allegations fail to raise a substantial and material question regarding Fox's compliance with the Commission's requirement that it provide reasonable access to or otherwise prevented from freely examining KTTV's public file. See, e.g., Storer Broadcasting Company, 56 RR 2d 243, 244 (1984).

Memorandum Opinion and Order, FCC 90M-3815, released December 4, 1990. [137] The ALJ also found that Rainbow's portrayal of Fox's behavior bore no comparison to the egregious and disqualifying derelictions present in Tri-State or Catoctin. [138] We generally agree with the ALJ's treatment of this matter, although we remind Fox to be vigilant in ensuring that the public's right of access to the KTTV-TV public inspection file is not frustrated by uninformed employees. The duty is on Fox to ensure access, not on the public. [139] However, we cannot find that the incidents described by Rainbow indicate the need for any further evidentiary hearing, since Fox admits to the slight problem and we find no willful disregard of the rule on this record. See Safe Broadcasting Corporation, 7 FCC Rcd 7638 (1992) (mere technical non-compliance with the public file rules does not raise a substantial and material question as to the licensee's basic qualifications).

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[135] Id., Exhibit 4 at 4-6.

[136] Bureau Consolidated Comments, at 8, citing Catoctin Broadcasting Corp. of New York, 62 RR 1132 [2 FCC Rcd 2126] (Rev. Bd. 1987), aff'd, 4 FCC Rcd 2553 (1989).

[137] The ALJ also concluded that Fox's submission of the Swan affidavit refuted the contentions made by Cole, and that, in any event, Fox had clearly publicized the availability of its renewal application for public inspection. Id. We discern no error in this ruling.

[138] Compare Tri-State Broadcasting Co., Inc., 5 FCC Rcd 1156, 1173 (Rev Bd. 1990) ("a pattern of neglect so strong as to appear nearly willful" was found where licensee failed to place local issues and problems lists for renewal term in its public file); Catoctin, supra, 2 FCC Rcd at 2137 (where licensee "knowingly, wilfully, and repeatedly" refused to make public file available and "tried to discourage, harass, and intimidate" those persons attempting to inspect the file).

[139] See 47 CFR § 73.3526.

66. Compliance Summary. We accord with Rainbow that Fox has not complied with several regulatory obligations. As to Fox's reporting failures, our decision in Valley Broadcasting, where we encounted many more, stated:

> It is well-settled that reporting failures will not warrant disqualification, absent suitable evidence of an intent to conceal pertinent information from the Commission, or other evidence reflecting violations so numerous and serious as to undermine the applicant's responsibility to be a licensee. See Radio Station WABZ, Inc., 90 FCC 2d 818, 825-827 (1982); Folkways Broadcasting Co., Inc., 48 FCC 2d 723, 727 (Rev. Bd. 1974); Vogel - Ellington Corp., 41 FCC 2d 1005, 1011 (Rev. Bd. 1973); see also Riverside Broadcasting Co., Inc., 53 RR 2d at 1162 (failure to comply with Section 73.3615 requirements does not raise substantial and material question of fact as to an applicant's qualifications where failure not based on an intention to conceal information).

4 FCC Rcd at 2618. [140] After considering that record, however, we there concluded (id., at 2619):

> The reporting violations and other errors were found to detract somewhat from the renewal expectancy, but the ALJ concluded that "the violations [were] not of such a nature as to diminish to any significant extent the renewal expectancy earned by Valley as a result of its substantial programming service...." Id. Hernstadt, who at the hearing did not challenge Valley's renewal expectancy showing, now disputes the ALJ's conclusion. It argues instead that "[r]enewal expectancy is not a factor to be judged solely by programming but rather on a licensee's overall

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[140] See generally Fox River Broadcasting, Inc., 93 FCC 2d 127, 129-130 (1983) (intent to deceive is the vital ingredient of disqualifying lack of candor). For a comprehensive discussion of this area, including a sharp criticism of Fox River, see Brian Murchison, Misrepresentation and the FCC, 37 FED. COMM. L. J. 403, 451-52 (1985), where the author figures that "intent to deceive" should be dispensed with as the cornerstone for disqualifying conduct, intent being too subjective a standard. But compare West Coast Media, Inc. v. FCC, 695 F.2d 617, 620 (D.C. Cir. 1982) ("intent to deceive the FCC...is at the heart of misrepresentation cases" and an applicant's "state of mind" is pivotal).

performance," and on that standard "Valley's numerous violations...militate against...any renewal expectancy." Br. at 41. We agree with the ALJ, however, that Valley has a record of meritorious broadcast service to the community of Las Vegas, and that the proven reporting violations are not of such a nature as to offset Valley's earned renewal expectancy. See United Broadcasting Co., Inc., 57 RR 2d 887, 897 (1985) (renewal expectancy slightly diminished for misconduct at other stations; "public detriment represented by misconduct was relatively small compared with public benefit represented by the licensee's meritorious broadcast record); Cowles Broadcasting, Inc., 86 FCC 2d at 1017 (risk to public interest posed by [main studio rule] violation seems small when compared to the actuality of depriving [community] of [licensee's] tested and acceptable performance).

67. In the case before us, we have examined the record and pleadings particularly closely for two reasons: first because the ALJ, with all due respect, appears to us to have given insufficient attention to these offenses in calculating Fox's overall renewal expectancy; and, second, because of what we perceive as insufficient attention, we felt it necessary to assure that Fox's reporting failures were the result of something less than a conscious effort to conceal, even over matters that would not at first blush seem siesmic. See FCC v. WOKO, Inc., 329 U.S. 223, 227 (1947). With respect to the cross-interest and civil suit omissions, this Board has no trouble concluding transgressions of Section 1.65, where the Mass Media Bureau and the ALJ saw none. But we must dampen any criticism because, as we have explored, we have found ambiguity and confusion, even on the part of this Board and, by its own admission, the Commission itself. Under these circumstances, we cannot in good conscience say that any evidence suggests that Fox was fully aware of its reporting duties on these matters, but consciously opted for deceit. It opted instead, for a narrow rather than a broad interpretation of its duties. We see this course as highly imprudent, particularly considering the ignominious fate of RKO, but far short of malign mistruth or concealment.

68. Were these reporting problems singular, we would have much less cause for concern. But in addition to Fox's propensity to play it close to the vest in reporting, see also infra note 188, we incorporate the misstatements in its EEO assertions and its admitted failure to live up to spirit, at least, of the Commission's public file rules. Taken individually, these imperfections would not amount to much or significantly weigh down any "renewal expectancy." We may be wrong, but we discern in this record the nascent glimmerings of a certain failure to appreciate that the license that Fox enjoys is a public privilege. Fox is a new licensee, which has served its local community well. Whether the compliance complaints we have voiced above are the product of over-(or under-

) lawyering, we cannot say. We do say that better is expected of broadcast licensees.

69. Community Outreach. Because the Commission has made vivid its intent not to rank an incumbent's "renewal expectancy" on a quantitative index, but to consider as well the "other factors" suggested by the court's opinion in National Black Media Coalition, supra, as a means to help measure a station's responsiveness to community needs and interests, the Board, after culling pertinent precedent, has held:

> While not precisely identified in Commission renewal policy statements as a separate service factor, the Board has examined whether to licensee "has reached out beyond the station into is community with offers of station help and support," Intercontinental Radio, 98 FCC 2d at 643, in order to help gauge the strength of that licensee's commitment to its community, or whether its efforts have been perfunctory....

Metroplex, supra, 4 FCC Rcd at 8156; see also Seattle Public Schools, supra, 4 FCC Rcd at 638 (licensee permits use of station as "megaphone for local self-expression").

70. The ALJ took Fox's evidence under this criterion, and at paras. 90-101 of the I.D. he summarized the numerous examples of community outreach by the station and its employees. These included specific programs to assist children in the area of gang violence, a hideous problem in Los Angeles (see "Children's [Identification] Day," id., paras. 91-94); a public service campaign directed at the homeless (see "No Home for the Holidays," id., paras. 96-98); and, in addition, the ALJ related the many other activities supported by KTTV-TV and its employees involving donations of time, talent and sophisticated equipment to community efforts. We also note that many of the affidavits and letters presented by Fox, and discussed previously, express sincere appreciation for Fox's generosity in making available station resources for a variety of public service activities. See id., paras. 87-57. See also id., para. 79. [141]

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[141] The ALJ there reported:

> KTTV also made its facilities and personnel available throughout the renewal period for the production of public service messages. The station's Public Affairs Director worked with local organizations to conceive and design public service campaigns. She also assisted in the production of PSAs by writing scripts, arranging for talent, and producing, directing and editing public service spots, using the station's

Mirabile dictu, bepraisement came from Rainbow's own principals (id., at para. 87):

> Rainbow's president, Esther Renteria, wrote twice to KTTV on the behalf of the Hispanic Public Relations Association to express her "deepest gratitude and appreciation" for KTTV's support for the Association's annual fundraising event providing scholarships for Hispanic students (Fox Ex. 9, pp. 145, 161). In addition, John Esheveste, Vice President, Telacu, and a 2% non-voting shareholder of Rainbow, wrote to commend KTTV's initiative in hosting a meeting with local community leaders "to discuss community needs, and to share suggestions as to how we can better access public service and news programming at KTTV." (Fox Ex. 9, p.164).

71. Other than a footnote declaiming this evidence "irrelevant," see supra para. 8, Rainbow does not dispute Fox's beneficent participation in the many community service activities depicted in the I.D. In its own commentary [142].

> The [Mass Media] Bureau recognizes that the Review Board has determined that community service and contributions to the community by the licensee are positive factors in determining whether a licensee has provided meritorious service warranting a renewal expectancy. See Metroplex, 4 FCC Rcd at 8156. While the Commission has not adopted these factors in its determination of the relevant criteria, it does not ignore them. See Metroplex, 5 FCC Rcd at 5611.

72. Respectfully disagreeing with Rainbow's legal position here, though it is not unreasonably based on the enigmatic dicta discussed supra paras. 8-9, and putting aside the Bureau's "now you see it -- now you don't," we continue to vouch that the record in this regard is very useful in helping to give shape, color, texture and dimension, as well as substance, to a licensee's record of responsiveness to its community. While certainly not required by the

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> technical facilities. KTTV also made and distributed duplicate copies of PSAs free of charge, for broadcast by other Los Angeles television stations (Fox Ex. 8, p.2).

[142] Bureau Reply at 18 n.2.

FCC, nor is this the paramount renewal criterion, the case law teaches that a history of community outreach definitely assists in determining whether we are dealing with a "minimal" performer or with a licensee that is not distant from, or indifferent to, its genuine constituency, the local populace. In comparison with other incumbents we have examined on this auxillary factor, KTTV-TV resides with the best. See, e.g., Intercontinental Radio, Inc.; Tele-Broadcasters of California; Seattle Public Schools; Metroplex. KTTV-TV not only broadcasts to the community, it has in relatively short order made itself an integral part of the community, at least on this record.

Renewal Expectancy Summary

73. Utilizing the five criteria propounded in paragraph 7, supra, we summarize our determinations. Despite the Commission's laissez-passer, Fox nonetheless took extraordinary measures to learn of the issues confronting the Los Angeles community. Under Criterion 1, its attention was far above and beyond its minimum obligation. Equally assiduous, under Criterion 2, was its programming keyed to those ascertained issues, a product of a systematic process designed to assure copious issue-responsive coverage. On the important litmus of its reputation in the community, the evidence presented under Criterion 3 reflects very favorably on KTTV-TV, and the record further suggests that its excellent repute was hard-earned. And, under Criterion 5, we perceive still additional evidence of a licensee actively involved in the affairs of its community. En gros, and compared to the records of previous renewal applicants we have perused, Fox's performance under those four criteria was exemplary, and in several aspects highly superior to the FCC's expectations as set forth in its promulugated renewal policies.

74. But just as Fox accumulated much public interest capital in a relatively short period, its rule violations occured over a correspondingly brief tenure. In comparison with other renewal applicants, see, e.g., Central Florida; Valley Broadcasting, we do not believe that Fox's transgressions were as serious as the former or as numerous as the latter. At the same time, it is our view that the evidence shows either carelessness or arrogance, depending on how the Fox compliance record is interpreted, and we cannot sweep them aside lest we condone such conduct on the part of all FCC licensees. Using precedent as a template, we judge that Fox's superior performance under Criteria 1, 2, 3 and 5 is downgraded under Criterion 4 to a level of "'substantial', i.e., sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." Central Florida, 683 F.2d at 508. In other words, whereas we do not disagree with the ALJ that the matters considered in paras. 186-200 would otherwise support a very "strong renewal expectancy preference" for highly meritorious public service, the matters not factored into the ALJ's reckoning, in our view, do detract from the strength of KTTV-TV's "renewal expectancy." [143] Fox was, in 1986, a new licensee, and perhaps unacquainted

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[143] Were there a need to make a comparative choice between Fox and Rainbow, we would have deployed the formula approved by the court in Central Florida. Rainbow, under the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 395 (1965), would enjoy a substantial preference under the "diversification" criterion. Even though the Commission's multiple ownership rules have been

with the absolute punctillio demanded by the Commission. By the time this decision is issued, another KTTV-TV license term nearly will have passed, and its record during those past five years will be available for scrutiny. Fox has now learned, we would trust, that exceedingly close scrutiny and licenseeship are occasionally coextensive.

RAINBOW BROADCASTING

75. Although we have found that, under the Central Florida standard, Fox would be preferred over Rainbow as a comparative matter, see supra note 143, and that the questions relating to Rainbow are therefore rendered nondecisional, [144] we see that in previous comparative renewal cases we have addressed exceptions relating to the challenger as a prudential matter, given the statutory levels of review. See, e.g., Metroplex, 4 FCC Rcd at 8160-61 (organizational structure and finances of challenger reviewed); KQED, Inc., 3 FCC Rcd at 2829-31 (finances of challenger reviewed); United Broadcasting Co., 93 FCC 2d 482, 505-09 (1983)(same). We shall follow that precedent.

76. Financial Issue(s). As previewed in our opening paragraphs, the Hearing Designation Order added an issue to determine whether Bank of America provided "reasonable assurance" of a firm commitment of a loan of $10 million Rainbow sought to construct a completely new television station and to operate

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relaxed considerably since Central Florida, and the Commission is actively considering an update of its "diversification" policy, see Re-examination of the Policy Statement, 7 FCC Rcd 2664 (1992), the Board is instructed to apply the 1965 Policy Statement for the present. See Liberty Productions, supra, 7 FCC Rcd at 7586. Much the same is true with respect to the Policy Statement's "integration" criterion. While this criterion is in considerable disrepute with the judiciary at the moment, see Flagstaff Broadcasting Foundation v. FCC, No. 91-2396 (D.C. Cir. Dec. 4, 1992)(citing Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992)), the Board must continue to apply the existing policy. See William L. Carroll, FCC 93-55, February 5, 1993 (applicant prevails for stronger "integration"). Unless we believed Rainbow's unsupported assertion that Rupert Murdoch is deeply involved in the day-to-day management of KTTV-TV, see supra paras. 28-29, Fox is not entitled to "integration" credit, and it seeks none in any event. Rainbow, which seeks a 50% "integration" credit (enhanced pro rata by a minority preference), therefore stumps for a moderate preference under this criterion. Rainbow Exceptions at 21 & n.5. Because we believe that Fox, all facets of its performance considered at once, has rendered at least the "substantial" performance of the licensee in Central Florida, we do not see how Rainbow could have prevailed on a comparative basis. Compare id., 683 F.2d at 508-510.

[144] "An agency, like a court, need not decide questions which are not relevant to its decision." Deep South Broadcasting Co. v. FCC, 278 F.2d 264, 266 (D.C. Cir. 1960).

for the inaugural three months without regard to advertising revenues. [145] Rainbow does not except to the designation of the issue [146]; it claims instead that "Rainbow received a November 18, 1988 written commitment from the Bank and, as to two terms that the bank did not want to state in writing, Rainbow received an oral understanding from the Bank." [147] But as the evidence demonstrated, and the ALJ correctly concluded, Rainbow's assertion that it had a "written commitment" from Bank of America was patently false; Rainbow's 1988 claim of "reasonable assurance" of such a commitment was bunkum from the very start.

77. Paragraphs 136-185 of the I.D. examine in the most minute detail the circumstances surrounding Rainbow's efforts at financing its proposed venture. Since Rainbow maintains vigorously that the ALJ's findings misstate or omit numerous material facts that seriously distort the picture, [148] we shall explicate the key findings of the I.D., juxtapose Rainbow's exceptions and the replies of Fox and the Bureau, and explain our own determination.

78. Prior to filing its application on November 1, 1988, Rainbow's principals made numerous attempts to secure a firm commitment of a bank loan of $10 million. Though Rainbow counsel, at oral argument, contended "that asking a bank to loan $10 million for a VHF television station in Los Angeles is really a slam-dunk," [149] the undisputed fact is that bank after bank refused to offer a tentative commitment to Rainbow, including First Interstate where a prospective Rainbow principal was vice-president. I.D., para. 136. Consequently, Rainbow could not certify as to its financial qualification when it filed its FCC application. Id., para. 137. [150]

79. Having commenced its challenge by filing for Channel 11 with no financial assurance, the I.D. reports that Rainbow's lead principal, Esther Renteria, pursued the possibility of a loan from Bank of America. She approached Alex Vasquez, the manager of the local branch where she was a depositor, and presented him with a draft letter prepared by Rainbow counsel

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[145] That minimum financial standard was set forth in New Financial Standards for Broadcast Television Applicants, 72 FCC 2d 784 (1979). Prior thereto, an applicant needed to show a cushion of 1 year's operating revenue. Ultravision Broadcasting Co., 1 FCC 2d 544 (1965).

[146] But see Rainbow Exceptions at 7 n.9 (suggesting a request for review of the HDO under 47 CFR § 1.115(e)(3)).

[147] Rainbow Exceptions at ii.

[148] Id., at 4.

[149] Tr. 1574.

[150] At the time Rainbow filed, it was permissible to file a broadcast application without a positive financial certification, a practice that led to an epidemic of abuse. See Revision of Form 301, 4 FCC Rcd 3853, 3858-60 (1989). Today, Rainbow's application would have been summarily dismissed as incomplete. 47 CFR § 73.3564.

which, in the most critical part, proposed that "this will confirm our willingness to loan up to $10 million to Rainbow Broadcasting, Inc., if and when the company should receive a permit from the FCC to construct a new television station at Los Angeles." I.D. at para. 140. That initial Rainbow draft went on to state (for the bank) that "we understand that [Rainbow] intends by this letter to rely on the bank for reasonable assurance of its financial qualification to construct and operate the station." Id. [151]

80. Whereas Vasquez knew Renteria to be a depositor at the Montebello branch, I.D., para. 37, and Vasquez (according to Renteria) felt that Rainbow would be a good project for the bank and the Hispanic principals, he informed Renteria that, as merely a branch manager, he had no authority to give any such commitment, but would take it up with higher bank authorities. Id., para. 141. Vasquez discussed the matter with Tim Jenson, a vice-president of the bank's City of Commerce unit "which served Vasquez's Montebello Branch in terms of reviewing applications and providing commercial loans." Id., at para. 142. After a 10-to-15 minute telephone conversation wherein Vasquez paraphrased Rainbow's draft letter to Jenson, Jenson responded with a letter dated November 7, 1988 to Renteria which stated (id., at para. 144):

> As we discussed, after Rainbow Broadcasting has obtained the appropriate operating licenses, Bank of America would be interested in discussing with you possible financing for the purchase of the television station. Any financing proposal would be subject to our review and analysis of all relevant financial statements and a satisfactory business plan. If you have any questions do not hesitate to contact me.

81. Renteria returned to Vasquez and informed him that the foregoing letter was inadequate. Id., para. 145. Following many further discussions between and amongst Renteria, Rainbow counsel, Vasquez and Jenson, Jenson provided Renteria with a second letter dated November 16, 1988, which, in pertinent part, stated (id., at para. 148) [152]:

> In response to our discussions regarding Rainbow Broadcasting's application to the Federal Communications Commission, this will confirm our willingness to consider a loan up to $10 million to Rainbow Broadcasting, Inc. after a complete analysis, if and when the company should receive a permit from the FCC to construct

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[151] The full text of counsel's initial draft is reprinted at para. 140 of the I.D.

[152] The full text of this letter is reprinted at para. 148 of the I.D.

a new television station at Los Angeles.

Renteria was not satisfied with that letter either, and had further discussions with the bank employees and her own counsel. Id., paras. 149-159. Ultimately, the bank furnished a letter of November 18, 1988 that stated (id., at para. 161):

> In response to our discussions regarding Rainbow Broadcasting's application to the Federal Communications Commission, this will confirm our willingness to consider a loan up to $10 million to Rainbow Broadcasting, Inc. after a complete analysis, if and when the company should receive a permit from the FCC to construct a new television station at Los Angeles.
>
> The loan would bear interest at a market rate above Bank of America's reference rate and would be repayable in consecutive monthly installments (including interest). It would be collaterized by assets acceptable to the Bank including all the operating assets of the station.
>
> The bank understands that there is no certainty that Rainbow Broadcasting's application for a new television station in Los Angeles will be granted by the FCC, nor even when a final determination will be reached.
>
> If and when the FCC permit is obtained, then a formal loan application would have to be filed and whatever lender qualifications are in existence then would have to be met by Rainbow Broadcasting, Inc.

Specifically elided from that bank letter was the following sentence, which Rainbow had expressly sought (id., at para. 163):

> Nevertheless, we understand that the company intends by this letter to rely on the bank for reasonable assurance of its financial qualifications to construct and operate the station....

The bank also did not include in the November 18 letter another sentence, requested by Renteria at her counsel's suggestion, that the loan "would be collaterized by the operating assets of the station," id., at para. 153; and the ALJ observed that (id., at para. 163):

> [a]dditionally, the [Rainbow] draft sought specificity regarding number of points above prime; a specific number of monthly installments for repayment; and a moratorium on payments till the fourth month; the bank November 18 letter did not provide any of the specifics nor the moratorium.

Upon receipt of that November 18 letter, however, Rainbow amended its pending FCC application to certify that it was then financially qualified. But, more than a month thereafter, Renteria sent a letter of December 21, 1988 to Jenson which, in pertinent part, stated (id., at para. 166):

> On behalf of Rainbow Broadcasting, Inc., I want to thank you and the Bank of America for your letter dated November 18, 1988.
>
> While your letter did not expressly state the interest rate that would apply to Rainbow's loan, it is my understanding from our discussions that collaterized loans of this nature would normally bear interest at two percentage points above the Bank of America's reference rate, adjusted at the time of the loan for any adverse change in the risk of business. It is also my understanding that the loan, if made by the Bank of America, would be repayable over a period of approximately 60-120 months and that a three-month moratorium on payments likely could be arranged.

Jenson did not respond to that letter, see id., and nothing further transpired between Rainbow and Bank of America.

82. At hearing, Vasquez and Jenson were questioned extensively. According to the ALJ, while Vasquez knew some of Rainbow's "investors" through the bank and their reputation in the Hispanic community, see id., para. 139, the bank was at no time supplied with documentation on Rainbow's business plan or its investors' financial statements. Id., para. 141. It was the understanding of Vasquez that Renteria was seeking a "letter of convenience"; and because Renteria was a depositor at his branch, [153] he said he would help to get it. See id., paras. 142-143. Vasquez spoke to Jenson and provided him a copy of Rainbow's draft letter seeking to confirm the bank's "willingness to loan up to $10 million to Rainbow," see supra para. 79; but after consulting with the bank's hierarchy and legal department, the most Jenson would supply at that

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[153] It is represented that Vasquez had known Renteria as a depositor at his branch for 6 months. Fox Reply at 17 n.22.

point was the letter of November 7, 1988 indicating an "interest in discussing with [Rainbow] possible financing for the purchase of a television station," and that only "after Rainbow Broadcasting had obtained the appropriate operating licenses." [154] See supra para. 80. It is agreed by all the parties to this case that Bank of America would do no more for Rainbow for fear of being sued later on. [155] Finally, Renteria's claim that she and Jenson reached an "oral understanding" on interest and repayment terms was not corroborated by anybody. See I.D., paras. 166-172. [156]

83. After reviewing all of the evidence, and limning the Commission's financial standards, the ALJ resolved:

> Rainbow has failed to establish the requisite "reasonable assurance" of the

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[154] (Emphasis added.) Jenson never met Renteria personally, I.D., para. 166, and at the time of the hearing he worked for Citibank. Rainbow Exceptions at 8 n.12. At hearing, Jenson went so far as to testify that he did not remember Vasquez or discussions about Rainbow, see I.D., paras. 167-168, but reconstructed only as to what his reasons might have been for his supposed actions at that time.

[155] See, e.g., I.D., 154-155, 168; Rainbow Exceptions at 1-2.

[156] At para. 155 of the I.D., it is also written:

> Renteria testified that she and Jenson came to an agreement that as a result of the various law suits certain things would not be put in the bank letter. She claimed that they came to an understanding of what the terms of the would be including the probable repayment and the probable interest rate. (Tr. 743, 747-748, 753). Specifically, according to Renteria. Jenson told her that the bank was no longer quoting prime rates of interest in writing, and was reluctant to quote a repayment schedule for a transaction that was going to be many years in the future. That was the reason why he could only tell her that it would be somewhere between 60-120 months. He also told her that the interest rate would probably be two points above prime, but he would not put that in writing. Based on the conversation, Renteria claimed to have a preliminary understanding with Jenson as to the reason why the interest rate and repayment information was not being put into the letter as she had asked. (Tr. 753-755).

> "present firm intention" of the Bank of America to make a loan up to $10 million dollars to Rainbow. Renteria has admitted that the November 18 letter is patently deficient on its face and does not provide reasonable assurance of the availability of a loan from Bank of America.

Id., at para. 207. He went on (id., at para. 208):

> Rainbow asserts that Renteria reached an oral understanding with bank officials concerning the specific terms which are not contained in the November 18 bank letter. According to Renteria, her informal conversations with Jenson provided her with "reasonable assurance" of the bank's "present firm intention" to make a loan to Rainbow. However, Renteria's account is not corroborated by the bank officials with whom she dealt. In fact, as discussed below, the bank officials' testimony is in conflict with Renteria in significant respects. Their testimony confirms the fact that the November 18 letter, on which Rainbow relies, was not intended to reflect a present firm intention on the part of the bank to make a loan to Rainbow.

And, he concluded (id., at para. 212):

> Renteria's assertion that the specific terms lacking in the bank letter were established in her conversation with Jenson is uncorroborated and will not be credited. Moreover, Jenson testified explicitly that the reason specific terms and conditions were not longer put in bank letters was to avoid the appearance of making any commitment to a potential borrower. Previous letters had resulted in litigation which was costly to the bank and were the catalyst for the bank's development of a rigorous process concerning the issuance of bank letters. In light of Jenson's understanding of the bank's policy and the bank's prohitition against issuing letters until a thorough review of the loan applicant was conducted, his explanation to Renteria that he could not commit the bank or put required terms in writing, and his lack of authority to issue "reasonable

> assurance letters", it strains credulity that Jenson would agree orally to specific terms and conditions for making the loan. Simply stated, Renteria was clearly put on notice as to the limitations on Jenson's authority, on the bank's policy against commitments, and as to the fact that Jenson simply refused to incorporate provisions of [counsel's] draft letter into the bank letter. Thus, any claim by Rainbow that it had a reasonable basis for relying on Bank of America funding is unfounded.

84. Rainbow counters that it is the victim of "unfair and shifty" banking practices [157]; that "[d]espite an adverse banking environment for FCC applicants in California during the fall of 1988" and Bank of America's reluctance to commit in writing, it did obtain "reasonable assurance" of a $10 million loan [158]; that "the I.D. falsely states that Vasquez called the commitment Rainbow was seeking a 'letter of convenience'" [159]; that "the I.D. falsely insinuates that Rainbow 'failed' to provide financial statements to the Bank," when the bank never requested them [160]; that even if Renteria herself testified that the bank's commitment, as reflected in the November 18, 1988 letter, did not evince "reasonable assurance" of a loan consistent with FCC standards, her "Oral Understanding" with Jenson overcomes any facial inadequacy [161]; that the

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[157] Rainbow Exceptions at 1.

[158] Id.

[159] Id., at 4. Actually, that is in haec verba what Vasquez did say in response to a question from Rainbow's own counsel. See Tr. 1154, which records:

> [Rainbow Counsel]: All right, now, with the questions that you've answered at this point, let me then ask that broad question. What understanding did you have, if any, with respect to what Rainbow wanted the Bank to do?
>
> [Vasquez]: My understanding at the end of that meeting was that Mrs. Renteria was seeking a letter, which I call a letter of convenience, which would say that we may or may not take a look at this thing in the future.

[160] Rainbow Exceptions at 5.

[161] Id., at 5-6. Passim, the exceptions capitalize the phrase "Oral Understanding," presumably for purposes of stature and the Commission's holding in Northampton Media Associates, 4 FCC FCC 2d 5517 (1989), that a financial

testimony of Jenson was marked by contradiction and "approached testimonial amnesia" [162]; that the bank had sufficient information about Rainbow and its principals, who were well known in the Hispanic community [163]; and that the ALJ improperly foreclosed Rainbow from using discovery to look into the possibility of interference by Rupert Murdoch with Bank of America. [164] In general, Rainbow relies upon Multi-State Communications Inc. v. FCC, 590 F.2d 1117 (D.C. Cir. 1978), cert. denied, 440 U.S. 959 (1979) and Las Vegas Valley Broadcasting Co. v. FCC, 589 F.2d 594 (D.C. Cir. 1978), for the proposition that the I.D. should be reversed on the financial issue.

85. Fox replies that, as a matter of law, the expression of a "willingness to consider" a loan at some later time does not meet the Commission's standard. It relies greatly on Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), review denied, 6 FCC Rcd 1893 (1991), and Northampton Media Assocs., supra note 161. [165] It further asserts that Renteria's claim of some "oral understanding" beyond the terms of the subject letter of November 18, 1988 is "unilateral." And, it challenges Rainbow on every jot, tittle and nuance of the testimony of Vasquez and Jenson, just as Rainbow's exceptions challenge molecularly the factual rendition of the I.D. [166]

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certification did not require contemporaneous documentation of any such financing agreement. (In Northampton Media Associates v. FCC, 941 F.2d 1214, 1216-17 (D.C. Cir. 1991), the court declined to affirm this novel interpretation of the FCC's documentation requirements for lack of a rational explanation for departure from precedent. There the matter yet legally stands. See Weyburn Broadcasting Limited Partnership v. FCC, infra para. 86, slip op. at 16-18.)

[162] See Rainbow Exceptions at 8-11. Rainbow also notes that, although Jenson now works for Citibank (where Rupert Murdoch is reported by the New York Times to be a customer), Jenson was represented at hearing by Bank of America counsel. Id., at 8 n.12.

[163] See id., at 10.

[164] See id., at 11-12.

[165] Fox Reply at 14-15.

[166] An example of these disputations is found in Fox's Reply at 17-18 (original emphases):

> 1. In attempting to claim a "long and established relationship" with Bank of America, Rainbow maintains that Vasquez "knew Renteria to be a good, long-time customer" of the bank and "thought [Renteria] to be creditworthy based on her deposits." Exceptions at 4 (emphasis in original).
>
> In fact, Vasquez testified that he had

little familiarity with Renteria or with Rainbow. Tr. 1149. His knowledge of Renteria's creditworthiness was "pretty vague." Tr. 1211. As a matter of bank policy, Vasquez could not make a creditworthiness determination without reviewing "a financial statement of some sort." Tr. 1209-11. Vasquez, however, did not have a financial statement for Renteria in November 1988. Tr. 1211. Renteria herself could not recall ever providing a personal financial statement to the bank. Tr. 688-89.

2. Asserting that Vasquez "examined a three-page dossier on Rainbow's shareholders," Rainbow faults the ALJ's finding that the bank lacked sufficient financial data to form a present firm intent to a make loan to Rainbow. Exceptions at 4.

In fact, the "dossier" provided to Vasquez contained only cursory notes regarding the supposed assets of each shareholder. Tr. 682-83; Rainbow Ex. 14. It did not value the listed assets, and contained no information regarding the shareholders' liabilities. Vasquez testified that the "dossier" could not have formed the basis for a determination of the creditworthiness of the listed shareholders because, in order to make such a determination, he would have had to review their financial statements. Tr. 1174. Renteria admitted, however, that the "dossier" was only financial "information regarding Rainbow or its shareholders until July 6, 1989 -- more than 7 months after Rainbow affirmatively certified its financial qualifications. Tr. 797.

Rainbow itself had been a client of the Bank for little more than a month before the November 18 letter was written. Vasquez had known Renteria as a depositor of his branch office for approximately 6 months. Renteria admitted that she had never spoken to Jenson prior to November 16, 1988 (two days before the November 18

The Mass Media Bureau aligns with the ALJ and Fox on their conclusions. [167]

86. Discussion. More than fifty years ago, the Supreme Court declared:

> An important element of public interest . . . affecting the issue of a license is the ability of the licensee to render the best practicable service to the community

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> letter was delivered) and that their entire relationship consisted of three telephone conversations. She never met Jenson personally. Tr. 797, 1149, 1206.
>
> Renteria admitted that the "dossier" did not establish the creditworthiness of any of Rainbow's shareholders "because it's not a financial statement." Tr. 752. Although Rainbow claims Renteria "knew in November 1988 that Rainbow was 'very well qualified financially'" (Exceptions at 4 n.4), she admitted at hearing that she did not know the net liquidity of any of Rainbow's shareholders in November 1988. Tr. 809. Moreover, although Rainbow states that Renteria had obtained personal financial statements from "some" Rainbow shareholders in November 1988 (Exceptions at 4 n.4), Rainbow was able to produce only one shareholder financial statement dated prior to November 19, 1988 (the date Renteria provided affirmative financial certification) in response to the ALJ's ruling. Tr. 672-75; Raimbow Exs. 15, 16. Renteria could not specifically identify a single financial statement for any Rainbow shareholder that she had seen prior to filing Rainbow's application. Tr. 666-68.
>
> In a particularly blatant example of its willingness to distort the record where it serves its purposes, Rainbow claims that "Vasquez testified that he had all of the financial data he needed about [Rainbow] in order to give 'reasonable assurance' ...." Exceptions at 10. In fact, Rainbow is citing to Renteria's testimony about information she did not provide to Vasquez. Tr. 688, 700, 703, 707-08.

[167] See Bureau Reply at 6-13.

> reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, inter alia, into an applicant's financial qualifications to operate the proposed station.

FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). "[T]o guard against premature station collapse," the Commission, pursuant to 47 U.S.C. § 308(b), has established uniform financial qualifications and:

> with the full realization that it is the function of the Commission to insure the validity of a national television system, we note that the Commission, from time to time, has sought to establish financial requirement standards for applicants to meet before the valuable license is awarded.

WEBR, Inc. v. FCC, 420 F.2d 158, 168-69 (D.C. Cir. 1969). That concern is no less valid now. See Weyburn Broadcasting Limited Partnership v. FCC, No. 91-1378, slip op. at 13-21 (D.C. Cir. Feb. 12, 1992). Although the Commission has substantially relaxed its financial requirements for new applicants since WEBR, see supra note 145, and at the time Rainbow filed the Commission was relying on a box-checking certification process, Rainbow's application form did require it to affirmatively avow [168]:

> Applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

87. The ALJ properly enunciated the Commission's long-time crystalization of that standard:

> When, as in this case, an applicant seeks

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[168] FCC Form 301 (Oct. 1986 ed.), Sec. III. The instructions to Sec. III provide:

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

> to rely on a bank loan for financing of its proposed station, the applicant must demonstrate that at the time of certification it had "reasonable assurance" of the loan's availability. See Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 (1980). In this regard, "[a] present firm intention to make a loan, future conditions permitting, is the essence of [the Commission's] 'reasonable assurance' standard." Id.

I.D. at para. 204 (original emphasis). That essential standard continues to this day:

> [A] broadcast applicant ... must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. Pepper Schultz, 103 FCC 2d 1052, 1058-59 ¶ 11 (Rev. Bd. 1986), review denied, 2 FCC Rcd 1476 (1987), recon. granted in part, 3 FCC Rcd 1200 (1988).
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> * * *
>
> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue...."

Northampton Media Assocs., supra note 161, 4 FCC Rcd at 5518-19 (emphasis added).

88. Shortly after the advent of the Commission's 1981 policy to permit an applicant to merely certify as to its financial qualifications, in lieu of submitting the actual documentation, the FCC's adjudicatory chain became saturated with applicants having certified on the basis of a mere "accommodation" letter, issued by either a friendly banker or, frequently, a

banker utterly unknown to the applicant. When examined in the throes of a financial issue, it developed that little or nothing stood behind those letters in terms of a tentative loan agreement, even if on their face such letters appeared superficially to represent a reasonable undertaking. See Dutchess Communications Corp., 101 FCC 2d 243, 244-49 (Rev. Bd. 1985),[169] where the Board noted the (then) recent cancellation of 14 television station construction permits and it alerted both the Commission and future applicants about this particular form of abuse of the certification procedure. Specifically in response to Dutchess, the Commission issued a Public Notice announcing that:

> after five years of experience with the financial certification requirement in lieu of documentation, it is clear that a number of broadcast construction permit applicants have certified their financial qualifications without any basis or justification. Such false certifications . . . waste the resources of both the Commission and legitimately qualified applicants. As a consequence, the public may receive delayed service, substandard service, or no service at all.

Certification of Financial Requirements, supra note 1, 2 FCC Rcd at 2122 & n.4. That 1987 notice also heralded a system of random audits of financial certifications, the very system that led to the designation of a financial issue against Rainbow.

89. Despite Dutchess and the 1987 Public Notice, the Commission and its adjudicators continued to encounter a string of applicants relying on mere "accommodation" letters to support a sworn certification. While too numerous to be inclusive, we cite as illustrative Shawn Phalen, 5 FCC Rcd 2622, 2623-24 n.2 (Rev. Bd. 1990)(emphasis added), where the banker's affidavit stated [170]:

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[169] See generally also Christina Communications, 2 FCC Rcd 1971, 1974 (1987)(emphasis added), where notwithstanding a purported "reasonable assurance" bank letter, a financial issue was designated for hearing against certain applicants because "it is clear that the applicants' individual qualifications were not considered by those banks" and that, therefore, "[i]nquiry is needed to determine whether the bank letters were more than accommodations" for the license applicants.

[170] The Board had earlier remanded on a financial issue against the subject applicant (Claudia Bratton), because it found that notwithstanding the bank letter, the applicant had not provided the bank with:

> (i) a business plan for her proposed station;
>
> (ii) written cost estimates of the station;

> Shortly after [applicant] Ms. Bratton contacted me to discuss the sort of bank letter that she needed in connection with her FM application, she sent me a draft of the type of "reasonable assurance" letter that she said would help with her application. In the covering letter that accompanied the draft "reasonable assurance" letter, Ms. Bratton stressed her understanding that (i) the letter she was asking me to provide to her could not be construed by her as indicating that the bank had made any determination as to her qualifications for the loan that she would need for the radio station, and (ii) before such a determination could be made, she would need to submit financial and other information sufficient to enable the bank to ascertain whether she met the bank's lending criteria. Based upon Ms. Bratton's written statement that ackowledged that the "reasonable assurance" letter she was requesting could not be relied upon by her as any sort of commitment on the part of the bank to actually maker her a loan, I modified the draft "reasonable assurance" letter in certain respects, had it typed on bank stationery, signed it, and sent it her. In providing her with a letter substantially along the lines of the one she had requested, I did so as an accommodaton to a potential customer and because I understood the letter as reflecting nothing more than the fact that the bank would be willing to consider a loan application from Ms. Bratton in the event she were successful in obtaining an authorization for the FM station.

See also, e.g., Janice Fay Surber, 5 FCC Rcd 6155, 6157 (Rev. Bd. 1990)(banker's

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> (iii) a personal financial statement or;
>
> (iv) information of any sort concerning her own personal financial condition, assets, net worth or the like.

Shawn Phalen, 5 FCC Rcd 53, 54 (Rev. Bd. 1989). Like Rainbow's Renteria, that applicant claimed that no such materials were provided because the bank never asked.

affidavit avers "[t]his letter was written strictly as an accommodation to Mrs. Surber and was not intended as a present firm intention by the bank to loan the sum Mrs. Surber requested"); Rebecca L. Boedker, 5 FCC Rcd 2855, 2857 (Rev. Bd. 1990)(banker testifies he issued nothing but "[a]n accommodation letter").[171] This is to be contrasted with cases in which a banker, when questioned, assures the Commission of the bona fides of a prior letter. See, e.g., Harrison County Broadcasting Co., 6 FCC Rcd 5819, 5821-22 (Rev. Bd. 1991)(banker thoroughly questioned at hearing and reaffirmed examination of individual qualifications of borrower, adequacy of collateral and mutual satisfaction of all loan terms). The Board has routinely added financial issues where the evidence has suggested strongly that an applicant was relying on a mere "accommodation" letter and that nothing tangible undergirded a purported loan commitment. See, e.g., Evansville Skywave, Inc., 7 FCC Rcd 4099 (Rev. Bd. 1992); Emission De Radio Balmeseda, Inc., 7 FCC Rcd 3852, 3856-58 (Rev. Bd. 1992); REM Malloy Broadcasting, 6 FCC Rcd 5843 Rev. Bd. 1991); Albert E. Gary, 5 FCC Rcd 6235 (Rev. Bd. 1990); Mableton Broadcasting Co., Inc., 5 FCC Rcd 6314, 6321-22 (Rev. Bd. 1990).

90. In analyzing whether Rainbow had a legitimate right to claim "reasonable assurance" of a firm commitment of a $10 million loan, the ALJ, at I.D., para. 205, employed the conventional triage, to wit:

> Whether (1) the bank has long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, see Multi-State Communications, Inc. v. FCC, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (e.g., collateral guarantees, see Chapman Radio and Television Co., 70 FCC 2d 2062, 2072 (1979) that, caeteris paribus, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (e.g., payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the

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[171] Because Boedker lost on comparative grounds, the Commission did not reach the financial issue in that case, Rebecca L. Boedker, 6 FCC Rcd 2557, 2559 n.2 (1991), and it substituted its decision while vacating the Board's.

> "individual qualifications" of the borrower have been preliminarily reviewed, Christina Communications, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, Chapman Radio, supra, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." See, e.g., Rebecca Boedker, [5 FCC Rcd 2855 (Rev. Bd. 1990)], vacated 6 FCC Rcd 2557 (1991); Marlin Broadcasting of Central Florida, Inc., 4 FCC Rcd 7045, 7946 (Rev. Bd. 1989). Conversely, where these fundamentals have been satisfied, we have found such "reasonable assurance." See, e.g., Colonial Communications, Inc., 5 FCC Rcd 1967 (Rev. Bd. 1990), recon. denied, FCC 90R-52, released June 25, 1990.

Scioto Broadcasters, supra, 5 FCC Rcd at 5160. [172] Or, as the Commission more compactly expressed in Liberty Productions, 7 FCC Rcd 7581, 7584 (1992)(footnote omitted):

> our concern is whether a bank letter affords reasonable assurance of committed funding to construct the proposed facility and operate for three months without station revenues. To determine reasonable assurance of a bank loan, we generally consider the following factors: whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower.

There, as in Scioto, the evidence was examined and the applicant found

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[172] In large part, the subject Scioto applicant was set for a financial issue because the bank letter of credit specified an interest of "prime commercial rate as defined in our loan documents, plus 2% and a 1% fee." The letter, said the order, did "not include the rate," thereby precluding the Commission from "calculating the ... monthly payments required during the first months of operation." See Columbus Broadcast Corp., 3 FCC Rcd 5480, 5483 (1988)(Hearing Designation Order). Since the bank there immediately explained the interest rate, and no other problems were perceived, that applicant passed financial muster. Scioto, 5 FCC Rcd at 5161.

qualified. See, 7 FCC Rcd at 7584 (bank letter held not to be "mere accommodation").

91. Invoking the court decisions in Multi-State Communications and Las Vegas Valley Broadcasting, Rainbow expounds the seductive proposition that since Bank of America "went as far as it could to support Rainbow" given its aversion to being legally bound, and inasmuch as no legally binding commitment is required for "reasonable assurance," Rainbow should be found qualified. [173] But Rainbow's syllogism is false, and it finds no refuge in the cited cases. Rainbow is quite accurate that the cited cases do caution the Commission that it cannot orate that it expects no legally binding commitment, and then apparently demand the functional equivalent. And Rainbow is equally correct that both panels warned the Commission that it ought not apply an impossible financial standard to a renewal challenger. The Board is keenly sensitive to those caveats; and, if anything, it has been lenient with such challengers. See, e.g., KOED, supra, 3 FCC Rcd at 2829-31. But as evident from the aforecited language from Scioto and Liberty Productions, the requirements on an applicant are neither rigorous nor unrealistic. Indeed, if truth be told, the Commission asks for a demonstration of no more, in principal elements, than would be necessary to qualify for financing a new Suzuki: (1) preliminary review of a borrower's credentials by the bank; (2) adequate collateral; and (3) tentative loan terms acceptable to borrower and lender.

92. Las Vegas Valley Broadcasting provides, we think, a decent exemplar of what should signal "reasonable assurance." There the bank had provided the applicant with a letter specifying the exact terms and conditions of a proposed loan. Moreover, in response to discovery questions, the bank time-and-again reaffirmed that it "remain[ed] willing to make its proposed loan," and a representative interrogatory answer from that bank provided, in the court's view, an indicium of "reasonable assurance":

> Answer: If the conditions stated will in fact exist at the time the loan is required, Nevada State Bank will make the loan in accordance with the terms stated in the August 23, 1971 letter of Mr. Calvin Smith, Jr. and the February 22, 1973 letter of Samuel S. Lionel, if Nevada State Bank and its correspondent bank feel that those conditions, together with other conditions then existing, make the loan a proper one.

589 F.2d at 601. No legally binding agreement was there indicated, and we contrast that situation with the posture of Bank of America in this case. Similarly, in Multi-State the applicant produced a letter from a Chase Manhattan Bank vice-president stating that "[w]e are willing to lend you up to $4,000,000"; that "[t]his bank is personally and favorably acquainted with several of your stockholders"; and that "[a]s a condition of our intent to finance Multi-State ... we are depending on the continued participation in your

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[173] Rainbow Exceptions at 9 & n.16.

venture of substantially all of the stockholders named in your application...." 590 F.2d at 1118 (emphasis added). Further, while that bank's vice-president declined at hearing to describe the commitment as legally binding, he did reaffirm the terms of the letter. Under all of those ambient circumstances, the court stated that "the bank had gone as far as it could ... short of making a legally binding loan commitment." Id., at 1119-20. The facts in the instant case could not be more different.

93. It may well be true, as Rainbow urges, that "in the adverse California Banking environment of 1988" [174] Bank of America would do nothing more than emit a "willingness to discuss a loan" after Rainbow received a construction permit. But if so, Rainbow should have followed the advice of its counsel as to how to proceed when it became incandescent that Bank of America would simply not commit, even to the most tentative terms of a potential agreement:

> [Rainbow Counsel]: What was your understanding from those discussions [with me] as to how you ought to proceed?
>
> [Renteria]: Well, it was my understanding that I should seek alternative ways of getting a stronger letter from the Bank of America, reaching some kind of oral understanding with the Bank of America, or finding another lending entity to give a different letter. And that's why we went ahead and Faxed some information over to Lem Daniels to see what his company could do for us. They had, in the past, done some financing, but we were told that because of market conditions, et cetera, that they were no longer doing them.

Tr. 869-870 (emphasis added). [175] One thing it should not have done was to

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[174] Id., at 4.

[175] Those "market conditions" are a large part of the reason, mayhaps, why securing a $10 million commitment was not the "slam dunk" Rainbow counsel had anticipated before Rainbow was flatly rejected (according to its own evidence, see I.D., para. 136) by one prospective lender after another. For a broader perspective on those "market conditions," see WORKING PAPER No. 26: BROADCAST TELEVISION IN A MULTICHANNEL MARKETPLACE (Office of Plans and Policy, Federal Communications Commission)(June 1991), which, after analyzing the cataclysmic changes in the video marketplace over the last 15 years, predicted: "Although broadcasting will remain an important part of the video mix ... weak independents in larger markets ... will find it particularly difficult to compete, and some are likely to go dark." Id., at vii. And, as the I.D. observes at para. 15, Los Angeles is already served by "at least 17 commercial ... and five non-commercial television stations."

certify under penalty of perjury that "Rainbow has obtained a written commitment from a major bank," [176] when it had nothing of the sort. It is irrefragable from the facts of record, even if viewed in a manner almost totally as Rainbow paints them, that Rainbow never seriously negotiated with Bank of America for a prospective loan; rather it negotiated solely for a colorable letter in a frenetic attempt to stave off Fox's pending motion to dismiss its application, see supra note 176. Because of Bank of America's steadfast reluctance, Rainbow never seriously negotiated any basic loan terms: an actual loan arrangement -- howbeit tentative -- was the least of its real concerns. Even if we were to accept, arguendo, that Renteria was verbally informed by the bank's Tim Jenson that, ordinarily, a $10 million loan might carry repayment terms of "between 5-10 years" and bear a "market rate" of, oh perhaps, "two points" above a "reference rate," [177] are we to suppose that these differences made no difference? And what of all the other terms Rainbow had requested of the bank (i.e., specific interest rate, repayment terms, and a 90-day moratorium on loan payments, see I.D., para. 163), but to which the bank did not respond in its letter of November 18, 1988; were these of no moment whatever? [178] The answer, from the standpoint of Bank of America was "yes," for it is indisputable from

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[176] Rainbow Amendment, dated November 9, 1988, and filed November 21, 1988. On November 9, 1988, Fox had filed a Petition to Dismiss Rainbow's application for lack of a financial certification. But see supra note 150.

[177] See Rainbow Exceptions at 6-7. We do not assume, of course, that Bank of America "orally" committed to the terms of a $10 million loan to a depositor no bank official other than a branch manager had ever met. Compare Multi-State. See also Liberty Productions, supra, 7 FCC Rcd at 7583 (Commission will "rely on the express terms of a loan agreement rather than on the self-serving ... testimony of the applicant's witnesses").

[178] We recognize that the Las Vegas Valley Broadcasting panel intuited:

> The applicant, naturally, wants as strong a commitment letter as possible without conceding undue advantages in the form of higher interest rates or excessive collateral. The bank seeks to cement relations with a potential customer without specifying terms that may prove costly.

589 F.2d at 599. But it is obvious from the content and context of that language that the court presupposed an actual negotiation over substantive terms. Rainbow is not wrong that "[a] bank letter which is technically deficient for lack of a term or two" does not necessarily make it an "accommodation" letter, Rainbow Exceptions at 13 n.27, which is precisely why the Board has consistently held that a "letter", eo ipso, is neither talismanic nor the Commission's substantive financial standard. A letter is merely evidence; and in every case cited by Rainbow's footnote, the Board has looked behind a dubious letter to discover what substance might stand behind the letter. See supra para. 89 (and cases cited therein); see also Christina Communications, supra note 169.

the evidence that, despite Rainbow's two-week persistence, the bank devoutly wished to extend no commitment at all, tentative or otherwise, and just as devoutly extended none. Compare Las Vegas Valley Broadcasting (bank letter "on its face satisfied the Commission" and banker repeatedly averred that, assuming unchanged conditions, the bank "will make the loan in accordance with the terms" of prior letter).

94. As in prior cases, see, e.g., Marlin Broadcasting of Central Florida, Inc., 4 FCC Rcd 7945, 7946-49 (Rev. Bd. 1989), review denied, 5 FCC Rcd 5751 (1990), aff'd, 952 F.2d 507 (D.C. Cir. 1992), Bank of America purposefully offered Rainbow no more assurance than any passive rider derives from a subway advertisement. That is, Bank of America finally yielded Rainbow a purposely meaningless missive saying (1) it would "consider" a loan application "if and when the company should receive a permit"; (2) that the loan would bear interest "at a rate above [its] reference rate"; (3) "be repayable in [unspecified] consecutive monthly installments"; and (4) be "collateralized by assets acceptable to the bank." See supra para. 81. That certainly describes the banking business in a nutshell; but it obviously and intentionally afforded Rainbow no more "reasonable assurance" of a $10 million loan than a matchbook cover. Were we to ignore all prior case law and find "reasonable assurance" here, it would nullify Section 308(b) of the Communications Act. Plain and simple.

95. No doubt apprehending that its hollow "accommodation" letter resonates more pathos than pedigree, Rainbow later pleads that "[n]o consideration is given to the FCC's repeated recognition that minority applicants, such as Rainbow, face special difficulties to obtaining financing."[179] But Rainbow is right only to the extent that "the Commission has consistently refused to relax those [financial] standards for minority applicants, notwithstanding the obstacles that they often experience in securing financing...." Salt City Communications, FCC 93-48, released January 29, 1993, at para. 22. On the other hand, this agency has substantially relaxed its general financial requirements to help ease the burden, see supra note 145; it has severely modified its licensing policies to permit creative minority financing, see Minority Ownership in Broadcasting, 92 FCC 2d 849 (1992); and it has shown great indulgence in permitting financial amendments where minority applicants have had difficulty in securing "reasonable assurance" of a firm loan commitment. See, e.g., Bison City TV 49 Limited Partnership, 91 FCC 2d 26 (Rev. Bd. 1982)(applicant unable to initially certify reports the failure of several successive financial proposals, but is permitted upon "good cause" showing to amend 9 months after designation of financial issue against it). Unlike the

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[179] Rainbow Exceptions at 15 n.34. Yet elsewhere in its exceptions, Rainbow insists that its shareholders' collective net worth exceeded $16.4 million, id., at 4 n.4, and that its difficulties in securing a commitment were caused by an "adverse California banking environment of 1988," id., at 4, and by the bank's fear of lawsuits, see id., at 5, 9, as well as "market conditions, et cetera." Tr. 869-870 (Renteria testimony). At no time, however, did Rainbow's principals suggest that they were willing to self-finance the $10 million. And, it has contended throughout that its "banker," Vasquez, was exceedingly receptive to Hispanic entrepreneurship.

candid applicant in Bison City, Rainbow did not patiently and diligently pursue a solid and earnest loan commitment; it hoped instead to be qualified by tour de force and produced only farce. We stoutly ratify the I.D. that Rainbow had no "reasonable assurance" of finances when it so swore in November 1988.

96. Notwithstanding the perspicuous fact that Rainbow had received no assurance, "reasonable" or otherwise, of a $10 million written loan commitment in November 1988, it charges that "the I.D. capriciously ignores the intimidating effect of 'Murdoch's interference' with Rainbow's commitment on the Bank's post-designation refusal to confirm its 1988 'reasonable assurance' to Rainbow." [180] Rainbow here adverts to the deposition of Jenson's Bank of America superior, Ralph Huesman, who allowed that he was telephoned by a New York official of the bank in September 1990. Rainbow claims [181]:

> Huesman identified the name "Rupert Murdoch" that he inscribed on a handwritten document dated September 13, 1990, which also refers to "News Corporation," and the phrase "legal action with small broadcasting company by name of Rainbow Broadcasting ... a letter from Tim Jenson."

It complains [182]:

> Rainbow timely argued that it should be allowed to engage in discovery against the three Bank officers who had material information regarding the Bank's post-designation refusal to confirm or clarify the Bank's 1988 commitment to Rainbow. See Reply, filed by Rainbow on December 7, 1990.

97. The Board has added abuse issues against an applicant where it has encountered properly supported allegations of malicious interference with another applicant. See, e.g., James C. Sliger, 69 FCC 2d 277 (Rev. Bd. 1977); Rocket Radio, Inc., 56 FCC 2d 283 (Rev. Bd. 1975); WIOO, Inc., 28 RR 2d 685 (Rev. Bd. 1973). For several reasons, we cannot find that the ALJ erred in this instance. First, because it is clear that Bank of America repeatedly refused in 1988 to give Rainbow the meanest whiff of a commitment, any 1990 inquiry by another bank official could not have poisoned the well; the well was bone dry

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[180] Rainbow Exceptions at 11-12.

[181] Id., at 12. Citing Judge Bazelon's dissent in Multi-State, Rainbow asserts that the ALJ's refusal to allow further discovery was "disturbingly prejudicial." Id.

[182] Id., at n.24.

to begin with, and that is all Huesman learned.[183] Second, while Rainbow's exceptions state as if fact the "intimidating effect" of interference by Rupert Murdoch, its counsel conceded that it had little evidence to support the indictment because the ALJ would not allow it to undertake discovery. See Tr. of Oral Arg. 1689-1691.[184]

98. That brings us to our third, and most compelling, reason for affirming the ALJ's ruling. At oral argument, Rainbow counsel argued extensively over the matter of Murdoch's alleged interference, upon which we inquired:

> [Board Member]: Were you asking then for an abuse of process issue?

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[183] See Huesman Deposition, passim.

[184] Huesman's handwritten notation "Rupert Murdoch" near the word "News Corporation" certainly does not substantiate personal involvement by Murdoch. While the "Fox" trade name is easily recognizable, and Rupert Murdoch himself is not unknown, "News Corporation" is a relatively obscure appellation, as witness this oral argument exchange with the Chairman of the Commission's Review Board (Tr. 1626; emphasis added):

> [Board Chairman]: It says, "Called regarding News Corporation Worldwide Media," and then it looks like something is added here, "Rupert Murdoch."
>
> [Fox Counsel]: That was the first --
>
> [Board Chairman]: It was the first?
>
> [Fox Counsel]: It was more than just the inquiry as to the status. Mr. Hoagland said, "News Corp. is a customer of the bank." Okay?
>
> [Board Chairman]: Why is that relevant?
>
> [Fox Counsel]: Because he said --
>
> [Board Chairman]: Why is it relevant?
>
> [Fox Counsel]: Because News Corp. is the parent company of Fox. Okay?
>
> [Board Chairman]: What?
>
> [Fox Counsel]: News Corp. is the parent company of Fox. News Corp. was a bank ... was a bank customer.

> [Rainbow Counsel]: No, we didn't have enough evidence for that, Mr. Blumenthal.

Tr. of Oral Arg. 1597. Counsel went on to make clear that although Rainbow had no evidence sufficient to support the enlargement of issues under Section 1.229(d) of the rules, [185] it wanted discovery so as to possibly acquire such evidence. See also Rainbow Exceptions at 12 n.24. The ALJ was absolutely correct in denying discovery. In its seminal Discovery Procedures, 11 FCC 2d 185, 187 (1968), the Commission ventilated:

> In one set of comments, it was suggested that we allow the examination of persons and parties to ascertain whether grounds exist for enlargement of the issues. This suggestion has been given careful consideration but has been rejected, at least for the present. The scope of the examination will be limited to matters relevant to the hearing issues, as originally proposed. In certain proceedings the range of possible issues is very broad. The use of discovery to ascertain whether grounds exist for enlargement of the issues would be difficult to limit and offers substantial opportunity for abuse. The effort made in our Policy Statement on Comparative Broadcast Hearings, of July 28, 1965, 30 F.R. 9660, to avoid unduly prolonging the hearing process by "fishing expeditions" into an applicant's every possible minor blemish would be undercut, without apparent sufficient compensating benefit, by permitting discovery beyond the range of

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[185] 47 CFR § 1.229(d) (emphasis added), regarding motions to enlarge issues, reads as follows:

> Such motions, opposition thereto, and replies to oppositions shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof. The failure to file an opposition of a reply will not necessarily be construed as an admission of any fact or argument contained in a pleading.

the issues set for hearing.
See also Priscilla L. Schwier, 4 FCC Rcd 2659 (1989), aff'd per judgment sub nom. New Life Evangelistic Center, Inc. v. FCC, 895 F.2d 809 (D.C. Cir. 1990); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 634 (D.C. Cir. 1978)(pre-issue-designation discovery would be "regulatory nightmare"). That the ALJ refused, against that express Commission edict, to invert the process for Rainbow does not constitute an "error" we are at liberty to reverse. Nor, as Rainbow has frankly conceded, do Huesman's deposition statements or his cryptic annotations, see supra note 184, provide much basis for issue enlargement; and absent evidence of malicious interference, Fox is surely not responsible for any internal discussions within Bank of America. Compare, e.g., Alabama Citizens for Responsive TV, Inc., 69 FCC 2d 1061, 1071-72 (1978)(documented allegations of interference with transmitter site). Rainbow's speculations, apart from having no logical connection to the bank's 1988 actions, were legally insufficient for the ALJ to have granted a "fishing" license to Rainbow, and its exception on this point is patently infirm.

99. Having determined that the ALJ committed no error in concluding that Rainbow had no honest predicate upon which to certify that it met the Commission's financial standard, [186] and that Rainbow -- by its own admission -- had insufficient evidence to warrant an issue on its entirely conjectural, if not illogical, claim that Bank of America's declination to offer or affirm the most tentative commitment in 1988 was somehow effected by 1990 interference from Murdoch, our review of this issue is at an end. The law we must follow is bright: "in the absence of a demonstration by the applicant that it had reasonable assurance at the time of certification, subsequent petitions to amend financial proposals have been disallowed." Aspen FM, Inc., 6 FCC Rcd 1602, 1603 (1991)(emphasis added); see also Capital City Broadcast Co., 7 FCC Rcd 2629 (1992)(no liberal amendment policy where initial financial certification is fatally flawed); KIST Corp., 99 FCC 2d 173, 175-181 (Rev. Bd. 1984), modified on other grounds, 102 FCC 288 (1985), aff'd per judgment sub nom. United American Telecasters, Inc. v. FCC, 801 F.2d 1436 (D.C. Cir. 1986), cert. denied, 481 U.S. 1050 (1987). Hence, Rainbow is entitled to no comparative consideration for KTTV-TV. See Louis Adelman, 28 FCC 432 (1960), recon. denied, 29 FCC 1223 (1960), aff'd sub nom. Guinan et al. v. FCC, 297 F.2d 782 (D.C. Cir. 1961). [187]

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[186] Because we affirm the I.D.'s objective conclusion that Rainbow had no "reasonable assurance" of a $10 million Bank of America loan, and the matter is now moot, we follow precedent in foregoing the more subjective question of whether Rainbow committed perjury in its initial sworn certification. See Texas Communications Limited Partnership, 6 FCC Rcd 5191, 5192 (1991), recon. denied, 7 FCC Rcd 3186 (1992).

[187] The ALJ reports that, on January 31, 1991, Rainbow withdrew reliance on Bank of America and sought to rely instead on an alleged commitment of $10 million from Far East National Bank. I.D., paras. 173-185. But after finding that Far East's lending limit was $3.5 million, id., para. 175, the ALJ applied the long-standing requirement that where a proposed loan exceeds a bank's lending limits, a mere assertion that loan syndication is customary is insufficient where there is no showing that "other banks would be willing to participate in

CONCLUSION

100. The record in the case reflects that Fox rendered "superior" performance to the denizens of Los Angeles, but a good deal more allegiance to its community of license than to Washington regula. In that latter regard, we have determined that the ALJ should have afforded more attention to the rule and

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extending funds to the full extent necessary to satisfy the commitment...." CBS, Inc., 49 FCC 2d 1214, 1229 (Rev. Bd. 1974); see also KIST Corp., supra, 99 FCC 2d 179-80; see generally also Las Americas Communications, Inc., 6 FCC Rcd 1507, 1509 (1991)(had Board known that proposed loan exceeded bank's lending limit, it "would have been faced with a substantially different question"). Compare, e.g., TVue Associates, Inc., 5 FCC 2d 419, 420 (Rev. Bd. 1966)(applicant submits letters from 5 other banks willing to participate in syndication); Lamar Life Broadcasting Co., 26 FCC 2d 112, 114-16 (Rev. Bd. 1970)(same). After noting that the identical requirement is placed on potential syndication of common carrier bank loans, see Corpus Christi Cellular Telephone Co., 3 FCC Rcd 1889, 1891 (1991); International Communications, Inc., 4 FCC Rcd 2702, 2704 & n.24 (1989); Advanced Mobile Phone Service, Inc., 52 RR 2d 1593, 1597 (1983), but that Far East National Bank:

> has not even contacted any banks, let alone secured loan commitments from them, Rainbow can not rely on the FENB letter for reasonable assurance.

I.D. at para. 216. Since Rainbow failed to show that any correspondent banks have been contacted regarding syndication, compare Las Vegas Valley Broadcasting, supra ("correspondent bank" in tentative accord), the ALJ concluded that, even if arguendo Rainbow were permitted to amend away from its initial certification, it failed to demonstrate "reasonable assurance" of $10 million from Far East.

Invoking GAF Corporation, 7 FCC Rcd 3225, 3228 (1992) and MacFadden Acquisition Corp., 104 FCC 2d 545, 567-68 (1986), where the Commission relied upon assurances from major Wall St. investment firms for necessary financing, Rainbow contends that the ALJ erred in discrediting its Far East loan. See Exceptions at 14. As we have said, under Aspen FM Rainbow was not entitled to amend, so this exception is academic. (See also Deep South Broadcasting v. FCC, supra note 144 (nondecisional exceptions)). We do note, however, that in the recent Salt City Communications, Inc., supra, the Commission reaffirmed the principle of CBS, Inc. and KIST, Corp. on loan syndications. Though these were Board-written decisions, the Commission stated that "while the Board's reading of KIST and CBS, Inc. was not unreasonable ... that reading is, in our view, unduly rigid." FCC 93-48 at para. 18. It there carved out an exception, albeit a "narrow one," where the proposed funding source is a Minority Enterprise Small Business Investment Company (MESBIC). See id. (all applicants must meet "burden of disproving ordinary assumption that funds in excess of lender's limit will not be available"). Unlike the Commission in Salt City, we do not think the ALJ's reading of CBS, Inc. and KIST, Corp. was "not unreasonable" but "unduly rigid," though we need not and do not decide formally.

policy violations detected by the license challenger and that these violations detract from what might otherwise have been a nearly insuperable "renewal expectancy." While the record does not expose a mendacity of the stripe encountered in cases such as KOED, Inc. or Tri-State Broadcasting, supra, for example, where the license challengers were held to be a better bet, it does irradiate either carelessness or hauteur [188] in Fox's attitude toward several important rules and policies, and its legal arguments on the cross-interest matter seem dolorously lame.

101. Rainbow, on the other hand, has benefitted by a litigation of its application in a manner of uncommon deftness [189]; still advocacy skills alone cannot transcend the basal fact that, pace its counsel, Rainbow was and remains what the court once characterized as "a 'nothing' applicant ... who comes before the FCC rather naked...." Fidelity Television, Inc. v. FCC, 515 F.2d 684, 705 (D.C. Cir. 1975). Feebly foraging as it might, Rainbow never acquired "reasonable assurance" of a firm commitment of inaugural financing. Although its counsel puffed "that asking a bank to loan $10 million for a VHF station in Los Angeles is really a slam dunk," Rainbow has contradicted itself and liberally conceded that (1) prior to filing, bank-after-bank flatly rejected

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[188] A flagrant example of this propensity is, we think, revealed in Fox's Petition For Leave To Amend, filed October 13, 1992, wherein the licensee reports that (according to the "news media") Rainbow has lodged a civil suit against Fox in California Superior Court, there repeating its allegations of interference with its purported "reasonable assurance" of a $10 million Bank of America loan. Fox characterizes the state civil suit as involving "non-FCC" conduct that "is not required to be reported to the Commission," though it reports it anyway "to avoid unnecessary litigation ... and in an abundance of caution." Petition at 3-4.

We have agreed with Rainbow that it proffered insufficient evidence to warrant an abuse of process issue against Fox, see supra para. 98; Rainbow never had "reasonable assurance" of a loan on this record, but we do not prejudge its local civil action. In that regard, however, we view as frivolous Fox's assertion that the civil suit, irrespective of the merits, involves a matter of no direct interest to the FCC. See Multi-State, supra, 590 F.2d at 1120 n.3 (Bazelon, J, dissenting), and Fox is expected to report the outcome of that state proceeding, so that the Commission may later consider the matter, if necessary. Character Policy Statement, supra, 102 FCC 2d at 1211.

[189] If we have one criticism of counsel's zeal, it comes of the gratuitous ad hominem attacks on the ALJ. See, e.g., Rainbow Exceptions at 24, where it accuses the ALJ of conducting a proceeding of a "one-sided nature" which "raises the recurrent question whether the Commission unlawfully stacks the deck against comparative renewal challengers." Apart from the fact that this rhetoric is out of date and demonstrably false, see supra para. 6 (incumbent licensees supplanted by challengers), the irony is Rainbow's persistent demand that Monroe Communications be a model in its favor. But this same ALJ found for the challenger in that case, see supra note 11, so this is not an ALJ who displays a "curious neutrality-in-favor-of-the-licensee." Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969).

Rainbow, so that (2) Rainbow could not even certify its finances when it filed its ambitious application. Bereft of a mote of financial assurance, Rainbow mocked the Commission's financial certification regime by proceeding regardless on a transpicuous "accommodation" letter from a bank that repeatedly explained to Rainbow why it would make no loan commitment whatever, even the most tentative. Our challenger, alas, is yet seeking somewhere a pot of borrowed gold. As the Supreme Court decreed more than a half century ago in FCC v. Sanders Bros. Radio Station, supra, likely financial ability to build and operate a new commercial broadcast station is "[a]n important element of the public interest." 309 U.S. at 475. Rainbow's "proof" at hearing was the denouement of its own undoing.

102. In the final analysis, the Commission's doctrinal predicate for supporting a "renewal expectancy" is this:

> (1) There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one. (2) Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded. (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry especially considering the large number of group owners. We cannot readily conclude that such a restructuring could serve the public interest.

Central Florida, supra, 683 F.2d at 507 (footnote omitted). Whereas Fox's attention to several FCC strictures has been less than rapt, and its legal flummery occasionally irksome, there is no factual or regulatory justification for penalizing the Los Angeles public to which Fox has shown powerful fealty in service and investment.[190] For as the court has reminded, "renewal expectancy will be factored in for the benefit of the public...." Id. (original emphasis). On the docket evidence, the Los Angeles public would owe no debt of gratitude were its government to undermine the proven service of Fox at KTTV-TV, and biblically festoon in token ... a Rainbow.

103. ACCORDINGLY, IT IS ORDERED, That the Motions To Reopen And To Enlarge the Issues filed, respectively, on January 18, 1992 and February 13,

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[190] As to some of that investment, see supra para. 16.

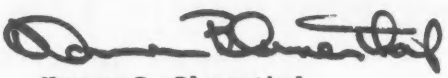
1993 by Rainbow Broadcasting, Inc., ARE DENIED; and

104. IT IS ORDERED, That the amendments filed by the parties, pursuant to 47 CFR §1.65, since the closing of this record ARE ACCEPTED for informational purposes; and

105. IT IS FURTHER ORDERED, That the Motions To Correct Transcript filed by the parties ARE GRANTED, and That all pleadings relating to the holding of Oral Argument ARE DISMISSED as moot; and

106. IT IS FURTHER ORDERED, That the application of Fox Television Stations, Inc. (File No. BRCT-880801LW) IS GRANTED, and the application of Rainbow Broadcasting, Inc. (File No. BRCT-881101KH) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Norman B. Blumenthal
Member, Review Board

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